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UNITED STATES REPORTS

VOLUME 334

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1947

OPINIONS FROM MAY 3, 1948, THROUGH JUNE 14, 1948
DECISIONS PER CURIAM, ETC., FROM MAY 3, 1948, THROUGH JUNE 21, 1948

WALTER WYATT
REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.
HAROLD H. BURTON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.

TOM C. CLARK, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

74604

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Frank Murphy, Associate Justice.

For the Eighth Circuit, Wiley Rutledge, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Wiley Rutledge, Associate Justice.

For the District of Columbia, Fred M. Vinson, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. iv.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice McReynolds[1]

WEDNESDAY, MARCH 31, 1948.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

May it please this Honorable Court:

At a meeting of members of the Bar of the Supreme Court, held on November 12th, 1947,[2] resolutions expressing their profound sorrow at the death of Associate Justice James Clark McReynolds were offered by a committee, of which the Honorable James F. Byrnes, former Associate Justice of the Supreme Court, was chairman.[3]

[1] MR. JUSTICE MCREYNOLDS, who had retired from active service on February 1, 1941 (312 U. S. III, n. 1), died in Washington, D. C., on August 24, 1946 (329 U. S. VII), and was buried at Elkton, Kentucky.

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Mr. John Lord O'Brian, Mr. Pierce Butler, Mr. John S. Flannery, and Mr. Roger Robb.

[3] The other members of the Committee on Resolutions were Mr. Sidney S. Alderman, Judge Florence E. Allen, Mr. T. Ellis Allison, Mr. Henry W. Anderson, Mr. William Douglas Arant, Mr. John E. Benton, Mr. Francis Biddle, Mr. James Crawford Biggs, Mr. William

Addresses on the resolutions were made by the Honorable John W. Davis, the Honorable George Wharton Pepper and the Honorable R. V. Fletcher.[4]

The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

At a meeting of the Bar of the Supreme Court of the United States held on November 12, 1947, to take appropriate action in memory of the late Mr. Justice McReynolds, the Committee appointed by the Solicitor General reported this Minute for submission and action:

Although he was a native of Kentucky, the career of James Clark McReynolds was more closely identified with the State of Tennessee, where he received his academic training and first practiced law. For many years he was the only representative of the South on the Supreme Court of the United States. Preeminently he represented the philosophy which has come to be known as that of the

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Marshall Bullitt, Miss Helen R. Carloss, Mr. Henry P. Chandler, Mr. Duane R. Dills, Mr. Robert G. Dodge, Mr. Charles D. Drayton, Mr. Henry S. Drinker, Mr. Charles Fahy, Mr. Robert V. Fletcher, Mr. John T. Fowler, Mr. William L. Frierson, Mr. Norman Frost, Mr. S. Price Gilbert, Chief Justice D. Lawrence Groner, Mr. P. F. Henderson, Mr. Robert H. Kelley, Mr. Francis R. Kirkham, Mr. Daniel W. Knowlton, Mr. William P. MacCracken, Jr., Mr. Maurice J. Mahoney, Mr. Blaine Mallan, Mr. William Clarke Mason, Mr. J. Howard McGrath, Mr. John T. McHale, Mr. Earl C. Michener, Mr. J. Blanc Monroe, Mr. George Maurice Morris, Mr. Hugh H. Obear, Judge David A. Pine, Mr. William Jennings Price, Mr. Seth W. Richardson, Mr. George Rublee, Mr. Morrison Shafroth, Mr. J. Allan Sherier, Mr. S. Milton Simpson, Mr. Robert Stone, Mr. Hatton W. Sumners, Mr. William A. Sutherland, Judge Thomas D. Thacher, Mr. Huston Thompson, Mr. G. Carroll Todd, Mr. William R. Vallance, Mr. Arthur T. Vanderbilt, Mr. George T. Washington, Mr. William R. Watkins, Mr. Alexander Wiley, and Mrs. Mabel Walker Willebrandt.

[4] It is regretted that limitations of space prevent the publication of these addresses in this volume. They have been published privately in a memorial volume prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of the Court.

constitutional Democrat. He characterized his own ideas as those "of an old-time Cleveland Democrat" and "of a gold Democrat."

He was the supreme type of the rugged individualist. Ruggedness was his outstanding characteristic. He was a large, six-foot frame of a man, with erect, military bearing and the aspect of an early Roman senator. He had a face of great strength, which might have seemed carved from Tennessee granite, but for the illumination of steel-blue eyes and a suddenly flashing smile. It was a face which could express every shade of feeling, from genuine graciousness and generosity of spirit, through flashing wit and humor, to the most satiric scorn.

As an individualist he believed in the individual and his rights. He believed also in the reserved powers of the States. He resented and resisted the growing exercise of power by the Federal Government in fields formerly conceived to have been reserved to the States. He was a strict constructionist, who felt an impelling conviction that the Federal Government ought to be held within the framework of its field of action as delegated to it by the people in the written Constitution and who resisted what he felt to be a tendency to amend the Constitution and to expand Federal power by judicial interpretation. And yet, likewise as an individualist, he was strongly opposed to monopoly and was a vigorous supporter of the antitrust laws.

He served over a quarter of a century on the Supreme Court: through World War I, through the following great depression, through the era of the vast expansion of Federal power, through the dramatic and historic attack by the Executive on the Judiciary, and through a period in which, ironically enough, he succeeded Louis Dembitz Brandeis as "the Great Dissenter." He held on with grim determination after the times had turned against his views and retired just two days before his seventy-ninth birthday. He presents the paradox of having come

to the Court as a much-vaunted, antitrust liberal and of having left it as the most die-hard representative of the conservative wing. Yet a careful study of his opinions throughout the quarter-century will disclose a pattern of inflexible and unyielding consistency. It was not James Clark McReynolds who changed. It was the times, the country, the prevailing constitutional views and the Supreme Court that changed. Justice McReynolds remained standing in his place, like a granite mountain.

Two illustrations will suffice to show his immovability. They are both in the field of his opposition to what he deemed to be encroachments of the Federal Government upon the reserved powers of the States.

One of his most famous dissents was a short one of three paragraphs in the *Oregon-Washington Railway and Navigation Company* case, in 1926. The Court, in an opinion by Chief Justice Taft, held that an act of Congress covered the whole field of plant disease control, so far as its spread by interstate transportation could be affected and restrained, and that consequently a statute of the State of Washington attempting quarantine against the interstate importation of alfalfa weevil was invalid. Justice McReynolds delivered a characteristically vigorous dissent, joined in by Justice Sutherland, in which he took the position that the act of Congress did not by its own terms conflict with the State statute, that the Secretary of Agriculture had taken no action under the powers delegated to him by Congress which conflicted with the State statute, and in which he concluded: "It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt." Congress promptly amended the Federal act interpreted in that case and made it clear that the views of the McReynolds dissent should prevail.

His last official action, on January 20, 1941, was to join with Chief Justice Hughes in concurrence in a dissent written by Mr. Justice Stone in the *Davidowitz* case. The majority, in an opinion by Mr. Justice Black, held that a Pennsylvania alien-registration statute was invalid as in conflict with the Federal Alien Registration Act, which was held to have occupied the field to the exclusion of state legislation. The dissenters saw no conflict between the two acts and warned: "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. . . . Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution."

This last official act is wholly reminiscent of his 1926 dissent and exemplifies the unchangeableness that was McReynolds.

His most famous dissent, one of the most dramatic ever delivered from the bench of the Supreme Court, was his dissent from the decision of the Court in the *Gold Clause Cases*. He was joined in it by Justices Van Devanter, Sutherland, and Butler. He completely departed from his written opinion and went to the country with an extemporaneous denunciation of repudiation of contracts and devaluation of the currency which electrified his auditors, sympathetic and unsympathetic alike. No stenographic transcript of what he said was taken. His

remarks were quoted only fragmentarily, in the press. It was feared that they would be lost to posterity. Justice McReynolds himself prepared a revision of his remarks, which was published by the Wall Street Journal as the most authentic version. Many who heard the utterance will remember passages that do not appear in that version and will remember differently many that do appear. He has often been quoted as saying, "The Constitution is gone." It is believed the expression he used was, "The Constitution, as we have known it, is gone."

Among the stronger expressions contained in Justice McReynolds' own revision are the following:

"Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler, and I do not accept the conclusions announced by the court. The record reveals clear purpose to bring about confiscation of private rights and repudiation of national obligations. To us, these things are abhorrent. We cannot believe the wise men who framed the Constitution intended to authorize them. On the contrary, adequate words of inhibition are there.

. . . . .

"First, the President is granted power to depreciate the dollar. He fixed sixty cents. Next, attempt is made to destroy private obligations by 'A Statute to Regulate the Currency of the United States.' Also to destroy Government obligations. The same language—the same section—covers both. Having put out five hundred million Gold Clause bonds in May, Congress declares in June that these promises so to pay in gold are illegal and contrary to existing public policy, although this had been consistently observed for many years and had been approved by the courts.

"After this effort to destroy the gold clause, the dollar is depreciated to sixty cents. Prices are to be estimated in deflated dollars. Mortgages, bank deposits, insurance funds, everything that thrifty men have accumulated, is subject to this depreciation. And we are told there is no remedy.

"We venture to say that the Constitution gives no such arbitrary power. It was not there originally; it was not there yesterday; it is not properly there today.

. . . . .

"It is said that the National Government has made by these transactions $2,800,000,000 and that all gold hypothecated to the Treasury now may be used to discharge public obligations! If the dollar be depreciated to five cents or possibly one, then, through fraud, all governmental obligations could be discharged quite simply.

"Shame and humiliation are upon us now. Moral and financial chaos may confidently be expected."

This fervid dissent accords with the view he himself had expressed many years before in another dissenting opinion that "an amorphous dummy, unspotted by human emotions" is not "a becoming receptacle for judicial power."

So much discussion of his dissents should not cast doubt on his profound contribution to jurisprudence in his many majority opinions throughout his long period of service. His dissents became more and more numerous after 1933. But throughout his long judicial career he made such a continuous and constructive contribution to judicial decision, in so many fields of the law, that it would be impracticable in these resolutions to attempt a summarization. That contribution will ever stand as vitally significant in the history of the period, of the Court and of its jurisprudence.

James Clark McReynolds was born in Elkton, Kentucky, on February 3, 1862, of Scotch-Irish descent, the son of Dr. John O. and Ellen (Reeves) McReynolds. His father was determined that he should be a professional man, a doctor or a lawyer, and sent him to Vanderbilt University, where he received the degree of Bachelor of Science in 1882, completing a four-year course in three years. He took first honors in his class, received the Founder's Gold Medal, and was elected valedictorian by his classmates.

He received his law degree from the Department of Law of the University of Virginia in 1884. Returning to Nashville, Tenn., he began the practice of law and also served as a member of the faculty of the Vanderbilt Law School. He achieved a considerable reputation by his zeal, diligence and ability in the practice there. In 1903 Philander C. Knox, Republican Attorney General, was looking for a $30,000-a-year lawyer who would work for $5,000. A friend gave him the name of James Clark McReynolds but warned that he was a Democrat. Mr. Knox said that he wanted a lawyer, not a politician, and he made the young Tennessee lawyer Assistant Attorney General and put him in charge of antitrust prosecutions. In this position McReynolds remained from 1903 to 1907 and successfully prosecuted many important cases. Thereafter he practiced for several years in New York City.

Later he came back to the Department of Justice as Special Assistant to the Attorney General and successfully prosecuted and argued in the Supreme Court the celebrated *American Tobacco Company* case, which was argued in January 1910, reargued in January 1911, and decided on May 29, 1911, and the famous *Temple Iron Company* case, decided December 16, 1912.

He served as Attorney General in President Wilson's cabinet in 1913 and 1914, in which position he had a stormy and controversial career. He was bitterly attacked by a group of Senators led by Senator Borah and Senator Works on a charge that he maintained a corps of special agents operating a system of espionage to investigate Federal judges with a view to influencing their decisions. A Senate resolution called on him for information regarding the matters charged, "so far as not incompatible with the public interest." He made a report to the President on August 6, 1913, transmitted also to the Senate, in which he took an unyielding position. He described the kind of investigating agents he maintained. He said that the disclosure of their names would be in-

compatible with the public interest. On the same ground he refused to name any judge who had been investigated, except Judge Archbald, whose impeachment trial was public property. And he sternly declared, "The suggestion that the Department of Justice is maintaining a system of espionage over the courts and judges of the country is entirely without foundation."

He was nominated Associate Justice of the Supreme Court of the United States by President Wilson in August 1914, to succeed Justice Horace Harmon Lurton, who had died July 12, 1914. He was confirmed by the Senate on August 29, 1914. He took the oath of office September 3, 1914. The judicial oath was administered to him and he took his seat on the bench at the opening of the following October Term. His first opinion for the Court was handed down on November 30, 1914; his last on January 20, 1941, twenty-six years and almost two months later.

The personnel of the Court when he took his seat in 1914 was: Chief Justice Edward Douglass White and Associate Justices Joseph McKenna, Oliver Wendell Holmes, William R. Day, Charles Evans Hughes, Willis Van Devanter, Joseph Rucker Lamar, Mahlon Pitney, and James Clark McReynolds.

When he retired on February 1, 1941, the personnel of the Court was: Chief Justice Charles Evans Hughes (who followed him in retirement on June 2, 1941) and Associate Justices James Clark McReynolds (the senior Justice), Harlan Fiske Stone, Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy.

His twenty-six years of service on the bench saw the passing from the scene of every member of the Court as constituted when he took his seat, except Charles Evans Hughes, who had returned as Chief Justice after an interval of fourteen years following his resignation to run for the Presidency against Woodrow Wilson, and likewise saw the passing of such intervening famous personalities

as George Sutherland, Pierce Butler, Louis Dembitz Brandeis, and Benjamin N. Cardozo.

His career was fittingly epitomized by Chief Justice Hughes when he said, after the opening of the Court on February 3, 1941:

"On February 1, 1941, Mr. Justice James Clark McReynolds retired from active service as Associate Justice of this Court. Forthright, independent, maintaining with strength and tenacity of conviction, his conceptions of constitutional right, he has served with distinction upon this bench for upwards of twenty-six years and has left a deep impress upon the jurisprudence of the Court. It is hoped that, relieved of the burden of active service, he will long enjoy his accustomed vigor of body and mind."

After his retirement, Justice McReynolds made his home at 2400 Sixteenth Street N. W., Washington, D. C. He had never married and for many years was the only bachelor on the Court.

He had an idiosyncrasy against smoking, which he applied with some rigor against his law clerks and which was generally respected by his guests. Yet he was a charming and gracious host and his Sunday morning breakfasts were famous. He loved duck hunting and golf. He was a great walker. He was a discriminating lover of books and a deep student of history.

A revealing side of his character was his gentleness and generosity to the humble and to those in need. During World War II he adopted thirty-three British children, supported them and personally corresponded with every one of them. Cartoons in the press treated the crusty old bachelor Justice as having outdone the old woman who lived in a shoe. His love of children is also shown by his many benefactions to the Children's Hospital of the District of Columbia. He made many unheralded benefactions to charities and to needy individuals during his lifetime, and in his last will and testament

he left charitable bequests totaling nearly $190,000 and many additional individual bequests.

After several weeks of illness in Walter Reed Hospital, he died on August 24, 1946, and was buried in the family burial ground in Elkton, Kentucky.

Men will always differ in their views of James Clark McReynolds as they differ in their attitudes toward constitutional questions. But no one can doubt that he was a man of great character and power, a significant figure in a time of great change, unshakable in his devotion to the public welfare as he conceived it and to constitutional principles in which he had the sincerest and profoundest belief.

Resolved, That the foregoing Minute be adopted; that a copy of it be transmitted to the Attorney General of the United States for presentation to the Court, and that the Chairman be directed to forward copies of it to the next of kin of Mr. Justice McReynolds.

Mr. Attorney General Clark addressed the Court as follows:

Mr. Chief Justice and Associate Justices: As we gather here today I deem it a privilege to speak in memory of the late Mr. Justice James Clark McReynolds, who passed away on August 24, 1946.

Mr. Justice McReynolds was born on February 3, 1862, at Elkton, Kentucky. He was educated in Tennessee, and received the degree of Bachelor of Science with highest honors from Vanderbilt University when barely 20 years of age. Entering the University of Virginia he was graduated from the Department of Law of that institution two years later. He thereupon entered upon the private practice in Nashville, Tenn., serving at the same time as a member of the faculty of the Vanderbilt Law School. His competence and enthusiasm for his work soon became widely known and greatly respected.

In 1903 Attorney General Philander C. Knox recognized in McReynolds the type of lawyer he was seeking—a $30,000-a-year man, as Knox himself put it, who would work for $5,000 a year. McReynolds was his man. He became Assistant Attorney General and was placed in charge of antitrust prosecutions.

The so-called "trust busting" era from 1903 to 1907 was the period during which McReynolds held that position. He was unstintingly active in the making of this history. Later he was destined to give completely of himself in assisting in the development of the law on the Bench of this Court.

The late Justice left the Federal service in 1907 and began the practice of law in New York City. In 1913, however, President Wilson invited him to accept the office of Attorney General of the United States, and in March of that year he assumed his duties as head of the Federal Department of Justice. He served in this capacity until he was nominated as an Associate Justice of the Supreme Court.

His activity with regard to the development of antitrust law is especially worthy of note. He prosecuted most of the important antitrust cases of his time. His prosecution and presentation of the case that broke the grip of the Tobacco Trust are said to have been brilliant. He was active in the suit brought against the Reading Company to end monopolistic control of the anthracite coal industry, and he vigorously conducted the *New Haven Railroad* case that attacked the New England transportation monopoly. He successfully fought the concentration of wire communications in the hands of the American Telephone and Telegraph Company and forced the dissolution of the combination created when the Union Pacific Railroad Company acquired control of the Southern Pacific Company.

Perhaps the best known of all the cases with which McReynolds was associated was the famous suit against

the American Tobacco Company. The *Tobacco Trust Case,* as it was called, was twice argued before the Supreme Court by some of the most eminent lawyers of the day. In its decision, rendered in 1911, this Court fixed into permanence the "rule of reason" which had first been stated in the earlier decision dissolving the Standard Oil Trust. It is not too much to say that this interpretation colored all subsequent development of the Sherman Antitrust Act, and it was certainly a basic factor in the enactment and content of the Clayton Antitrust Act and the Federal Trade Commission Act of 1914.

Mr. McReynolds' tenure as Attorney General lasted a little over a year, and terminated with his accession to the Bench of this Court. He was nominated by President Wilson in August of 1914, to fill the vacancy left by the death of Justice Horace Harmon Lurton on July 12 of that year. He took his seat on this Bench at the opening of the October 1914 term. He sat as a member of the Court from that time until February 1, 1941, when by retirement he ended twenty-seven years' service as an Associate Justice of the Supreme Court of the United States. After retiring he remained in Washington, where he died on August 24, 1946.

I should like to refer, Mr. Chief Justice and Associate Justices, to the character and philosophy of the late Mr. Justice McReynolds.

I suppose that the salient points in his character and philosophy were a rigid righteousness, an unyielding determination, and unshakable stability. When he felt deeply on a question, his view absorbed him so completely that he had the greatest difficulty in moderating his expression, or in tolerating sustained argument by those who opposed him. Those who were present when this Court rendered its decision in the *Gold Clause Cases* report that Justice McReynolds was almost beside himself with feeling as he spoke extemporaneously in dissent. He could not be tolerant on an issue which seemed to

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him so deeply of the essence of our national honesty and honor. He could not be cool and detached in the face of what he considered to be a repudiation of right conduct on the part of our Government.

Justice McReynolds' judicial philosophy always limited him to the naked question at bar. It prevented him from unnecessarily expressing an opinion on related issues in obiter dicta, and it made his style terse and direct. A well-known manifestation of this characteristic was his three-paragraph dissenting opinion in the case of *Oregon-Washington Railroad & Navigation Company* v. *State of Washington,* in 270 U. S. 87, 103 (1926). There, in discussing the validity of a state statute of Washington, where the Congress had legislated on the broad subject by delegating authority to the Secretary of Agriculture, but where the Secretary had not acted, Justice McReynolds disagreed with the view of the majority of the Court that the State statute was unconstitutional. His style and his philosophy are both illustrated by the concluding paragraph of that short dissent, where he stated that "It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt."

Justice McReynolds was persevering and stable in his character and in his views.

Philosophically, morally, professionally, Justice McReynolds remained constant—changing but little, if any. When he began his career he was thought to be rather radical in his views, particularly on public business; when his active life ended in retirement, his position was considered conservative. But Justice McReynolds himself was neither liberal nor conservative. It was simply that the nation was more conservative than he at the beginning of his career, and more liberal at its end. It was the times—the public, popular political preferences, the

world situation—that changed and not he. During history's shifting of scenes on the stage of political and social movement, this man remained an enduring rock of fixed location, a philosophical bench mark from which a historian might survey the past or future temper of the nation.

Justice McReynolds could not have been otherwise. His code of honor was inflexible and unyielding. He could no more yield at the end of his career to the proponents of a progressivism with which he disagreed than he could have given way at the beginning of his career to those who upheld the older order. He was strong in his beliefs, and his feeling endured that those beliefs were right.

The late Justice was the prototype of the rugged individualist, believing firmly in man living independently and untrammeled by restrictions. He opposed monopoly and power, whether such power was exercised by private interest or by public, whether it arose from the concentration of wealth and strength in the hands of individual citizens, or whether it resulted from an expansion by the Federal Government, whose authority he feared as overflowing the banks formed by the Constitution.

Contrary to public belief, Mr. Justice McReynolds was not a lonely man. He loved the company of those who shared his views and his principles. He had a big heart for the young and for education. While he was in truth unbending in his political and judicial views, he had all of the human qualities that endeared him to all who knew him. At his death he left large bequests to Centre College—for educational and religious purposes. During his life he followed the practice of giving generously—and anonymously—to charity.

On his daily walks one would hear him inquiring as to the welfare of his neighbors and particularly the youngsters. On some occasions his walks would be interrupted by an unkempt, hurt child. He was never too engrossed

or self-contained to stop and bend down on such occasion to console the tot and assuage the pain, and place a coin or two into its little hand.

May it please this Honorable Court: In the name of the lawyers of this nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice James Clark McReynolds be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE responded:

Mr. Attorney General: In receiving the Resolutions which you have presented, the Court expresses deep appreciation for the tribute from the Bar of this Court to the memory of this eminent lawyer, statesman, and jurist—an able and faithful member of this Court, who gave 26 years of his life in its service.

James Clark McReynolds was born in the town of Elkton, Kentucky, in the second year of the War between the States. His ancestry was of the sturdy Scotch-Irish stock which has contributed so greatly to the development of the American republic and which has produced so many distinguished figures in American public life.

James McReynolds grew to maturity during that period in our history in which the American nation was undergoing a transition from a society predominantly agricultural in interests and outlook to a society dominated by the interests and problems of an industrial civilization. He was graduated from Vanderbilt University in 1882 with highest honors, was elected valedictorian of his class and was awarded the Founder's Gold Medal. Two years later, he received his degree in law from the University of Virginia.

At the conclusion of his professional training, he entered into the practice of law in Nashville, Tennessee, where

he gained an enviable reputation for diligence, ability, and integrity. During the same period, he supplemented his activities as a practicing attorney by serving as a member of the faculty of law at Vanderbilt University.

In 1903, though a member of the Democratic party, he was appointed Assistant Attorney General in the administration of President Theodore Roosevelt and was placed in charge of antitrust prosecutions. He performed his important duties with distinction for four years, leaving his post in 1907 to undertake the practice of law in New York City. Shortly thereafter, he returned to the Department of Justice as Special Assistant to the Attorney General and participated in some of the most important antitrust litigation of the period, including the *American Tobacco Company* case.

In March 1913, he was appointed Attorney General by the newly elected President, Woodrow Wilson. He served in that capacity until August 1914 when he was appointed an Associate Justice of the Supreme Court of the United States to fill the vacancy caused by the death of Mr. Justice Lurton. He was an active member of this Court for over twenty-six years, serving until his retirement on February 1, 1941. Death came at the age of 84 on August 24, 1946. He was buried in the family burial ground in Elkton, Kentucky.

Mr. Justice McReynolds performed his judicial duties during a crucial period in American history. He entered into his office some six weeks after the outbreak of the European phase of the first World War. He left the bench while a second World War was raging overseas. In the intervening period, the nation experienced a major economic depression. Inevitably, the impact of the events of the time gave rise to issues of the highest importance, many of which this Court was called upon to resolve.

To the solution of these perplexing problems, Mr. Justice McReynolds brought a fully matured legal philoso-

phy. It was a set of principles which has been given frequent expression in American Constitutional history. It calls for strict construction of constitutionally granted powers, vigorous defense of States' rights, and for narrow confinement of governmental interference with individual freedom of action. Mr. Justice McReynolds brought to his judicial labors a deep conviction that the structure of this nation had been built on strong foundations. He believed that it was in the functioning of the judicial process that those foundations could best be preserved and strengthened; and upon that process he based his greatest hopes for our future welfare. He also believed, as he once remarked, that the power of this Court "does not lie in the army, it does not lie in the navy, nor in the militia; it lies in the faith of the people for whom it was created . . . ." For over twenty-six years Mr. Justice McReynolds consistently applied these principles with zeal, ability, and diligence, and with a conviction and intensity which could not brook compromise. "Constitutional guarantees," he wrote upon one occasion, "were intended to be immutable essences within our character . . . . Certain fundamentals have been put beyond experimentation." But, in his view, the function of the judge is not that of a mere automaton. Thus, in his dissent in *Berger* v. *United States*, 255 U. S. 22, 43, he remarked: "And while 'an overspeaking judge is no well-tuned cymbal' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."

During his long tenure upon the bench, Mr. Justice McReynolds expressed his views, both in majority and dissent, in a great number of cases presenting the immense variety of problems which come before this Court. His opinions reveal a conscious and continuing effort to decide no more than required by the issues of the particular case before him. His writing shows little taste

for epigram. His literary style, characteristic of the man, was terse, direct, and clear, yet capable of translating to the reader the conviction and fervor with which his views were expressed. He wrote during a period when the integration of our society through a developing industrialism and the rapid growth of transportation and communication necessitated adjustments between the roles of the federal and state governments; but he never lost sight of the place of the States in the American governmental system. He appreciated the importance of private property in our economy and recognized that the maintenance of law and order is fundamental to the national welfare. The expression that his opinions give to those views reinforces the basic constitutional theories that governed his decisions.

Mr. Justice McReynolds was a man of broad intellectual interests. He was a generous host, and greatly enjoyed the company of his friends. The welfare of children was a matter of genuine concern to him. Upon his retirement from the Court, he "adopted" and supported thirty-three British children whose homes had been destroyed by the bombings of London. His interest in these innocent victims of war was personal and profound. He gave a further practical manifestation of his concern by offering to contribute the first $10,000 to a $10,000,000 Save the Children Fund. His will contained numerous bequests to charities dedicated to child welfare and to others concerned with the care of the weak and the helpless. Throughout his life, Mr. Justice McReynolds was interested in the education of young people. His will contained several substantial gifts to institutions providing legal education, reflecting an interest derived from his long career as teacher of law, practitioner, and judge. But he was concerned, not only with professional training, but also with the problems of general education. Thus his will contained bequests to liberal arts colleges

such as Centre College at Danville, Kentucky, an institution which he loved, though of which he was not an alumnus.

Above all, Mr. Justice McReynolds was a man of sincerity and independence. His views on the controversial issues of his time were, to him, matters of vital moral conviction. In their defense, he dedicated the full resources of his spirit and character. It is not surprising that his views evoked strong response, both in support and opposition. But even those of a different philosophy found much to admire in his absolute integrity and his rugged forthrightness. Complete conformity in thought and opinion has never been considered a virtue in this Republic. It is a basic tenet of our political doctrine that out of the clash of opposing views we are most likely to approach truth. So long as that is our faith, we will pay tribute to the memory of a man who never deviated from the path of principles which to him were fundamental to the nation's welfare.

The Chief Justice directed that the resolutions be spread upon the minutes of the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1947.

SHELLEY ET UX. *v.* KRAEMER ET UX.

NO. 72. CERTIORARI TO THE SUPREME COURT OF MISSOURI.*

Argued January 15–16, 1948.—Decided May 3, 1948.

Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes do not violate the Fourteenth Amendment; but it is violative of the equal protection clause of the Fourteenth Amendment for state courts to enforce them. *Corrigan* v. *Buckley*, 271 U. S. 323, distinguished. Pp. 8–23.

(a) Such private agreements standing alone do not violate any rights guaranteed by the Fourteenth Amendment. Pp. 12–13.

(b) The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the Fourteenth Amendment. Pp. 14–18.

(c) In granting judicial enforcement of such private agreements in these cases, the states acted to deny petitioners the equal protection of the laws, contrary to the Fourteenth Amendment. Pp. 18–23.

(d) The fact that state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by them does not prevent the enforcement of covenants excluding colored persons from constituting a denial of equal protection of the laws, since the rights created by § 1 of the Fourteenth Amendment are guaranteed to the individual. Pp. 21–22.

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*Together with No. 87, *McGhee et ux.* v. *Sipes et al.*, on certiorari to the Supreme Court of Michigan.

(e) Denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements. P. 22.

355 Mo. 814, 198 S. W. 2d 679, and 316 Mich. 614, 25 N. W. 2d 638, reversed.

No. 72. The Supreme Court of Missouri reversed a judgment of a state trial court denying enforcement of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. 355 Mo. 814, 198 S. W. 2d 679. This Court granted certiorari. 331 U. S. 803. *Reversed,* p. 23.

No. 87. The Supreme Court of Michigan affirmed a judgment of a state trial court enjoining violation of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. 316 Mich. 614, 25 N. W. 2d 638. This Court granted certiorari. 331 U. S. 804. *Reversed,* p. 23.

George L. Vaughn and *Herman Willer* argued the cause and filed a brief for petitioners in No. 72. *Earl Susman* was also of counsel.

Thurgood Marshall and *Loren Miller* argued the cause for petitioners in No. 87. With them on the brief were *Willis M. Graves, Francis Dent, William H. Hastie, Charles H. Houston, George M. Johnson, William R. Ming, Jr., James Nabrit, Jr., Marian Wynn Perry, Spottswood W. Robinson, III, Andrew Weinberger* and *Ruth Weyand.*

By special leave of Court, *Solicitor General Perlman* argued the cause for the United States, as *amicus curiae,* supporting petitioners. With him on the brief was *Attorney General Clark.*

1 Counsel for Parties.

Gerald L. Seegers argued the cause for respondents in No. 72. With him on the brief was *Walter H. Pollmann.* *Benjamin F. York* was also of counsel.

Henry Gilligan and *James A. Crooks* argued the cause and filed a brief for respondents in No. 87. *Lloyd T. Chockley* was also of counsel.

Briefs of *amici curiae* supporting petitioners were filed by *Perry W. Howard* for the Civil Liberties Department, Grand Lodge of Elks, I. B. P. O. E. W.; *Isaac Pacht, Irving Hill* and *Clore Warne; Robert McC. Marsh* and *Eugene Blanc, Jr.* for the Protestant Council of New York City; *Herbert S. Thatcher* and *Robert A. Wilson* for the American Federation of Labor; *Julius L. Goldstein* for the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; *Melville J. France* for the General Council of Congregational Christian Churches et al.; *Robert W. Kenny, O. John Rogge* and *Mozart G. Ratner* for the National Lawyers Guild; *Lee Pressman, Eugene Cotton, Frank Donner, John J. Abt, Leon M. Despres, M. H. Goldstein, Isadore Katz, David Rein, Samuel L. Rothbard, Harry Sacher, William Standard* and *Lindsay P. Walden* for the Congress of Industrial Organizations et al.; *Phineas Indritz, Irving R. M. Panzer* and *Richard A. Solomon* for the American Veterans Committee; *William Maslow, Shad Polier, Joseph B. Robison, Byron S. Miller* and *William Strong* for the American Jewish Congress; *Joseph M. Proskauer* and *Jacob Grumet* for the American Jewish Committee et al.; *William Strong* for the American Indian Citizens League of California, Inc.; *Francis M. Dent, Walter M. Nelson, Eugene H. Buder, Victor B. Harris, Luther Ely Smith* and *Harold I. Kahen* for the American Civil Liberties Union; *Earl B. Dickerson, Richard E. Westbrooks* and *Loring B. Moore* for the

National Bar Association; *Alger Hiss, Joseph M. Proskauer* and *Victor Elting* for the American Association for the United Nations; and *Edward C. Park* and *Frank B. Frederick* for the American Unitarian Association.

Briefs of *amici curiae* supporting respondents were filed by *Roger J. Whiteford* and *John J. Wilson* for the National Association of Real Estate Boards; *Ray C. Eberhard* and *Elisabeth Eberhard Zeigler* for the Arlington Heights Property Owners Association et al.; and *Thomas F. Cadwalader* and *Carlyle Barton* for the Mount Royal Protective Association, Inc.

Mr. Chief Justice Vinson delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

> ". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any

> portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.[1] The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

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[1] The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution.[2] At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

> "This property shall not be used or occupied by any person or persons except those of the Caucasian race.

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[2] *Kraemer* v. *Shelley*, 355 Mo. 814, 198 S. W. 2d 679 (1946).

> "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment.[3]

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.[4] Spe-

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[3] *Sipes* v. *McGhee*, 316 Mich. 614, 25 N. W. 2d 638 (1947).

[4] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

cifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of *Corrigan* v. *Buckley,* 271 U. S. 323 (1926). There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes.[5] The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue

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State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] *Corrigan* v. *Buckley,* 271 U. S. 323, 330–331 (1926).

before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was *Hansberry* v. *Lee,* 311 U. S. 32 (1940). In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the

affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more." [6]

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.[7] Thus,

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[6] *Buchanan* v. *Warley*, 245 U. S. 60, 73 (1917).

[7] *Slaughter-House Cases*, 16 Wall. 36, 70, 81 (1873). See Flack, The Adoption of the Fourteenth Amendment.

§ 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration,[8] provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [9]

This Court has given specific recognition to the same principle. *Buchanan* v. *Warley,* 245 U. S. 60 (1917).

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan* v. *Warley, supra,* a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire

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[8] In *Oyama* v. *California,* 332 U. S. 633, 640 (1948) the section of the Civil Rights Act herein considered is described as the federal statute, "enacted before the Fourteenth Amendment but vindicated by it." The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, subsequent to the adoption of the Fourteenth Amendment. 16 Stat. 144.

[9] 14 Stat. 27, 8 U. S. C. § 42.

property without state legislation discriminating against him solely because of color." [10]

In *Harmon* v. *Tyler,* 273 U. S. 668 (1927), a unanimous court, on the authority of *Buchanan* v. *Warley, supra,* declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected."

The precise question before this Court in both the *Buchanan* and *Harmon* cases involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color is clear, not only from the language of the opinion in *Buchanan* v. *Warley, supra,* but from this Court's disposition of the case of *Richmond* v. *Deans,* 281 U. S. 704 (1930). There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the Fourteenth Amendment. Such relief was granted, and this Court affirmed, finding the citation of *Buchanan* v. *Warley, supra,* and *Harmon* v. *Tyler, supra,* sufficient to support its judgment.[11]

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils.

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[10] *Buchanan* v. *Warley,* 245 U. S. 60, 79 (1917).

[11] Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in contravention of the Fourteenth Amendment. *Glover* v. *Atlanta,*

Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases,* 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[12]

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan* v. *Buckley, supra.*

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive

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148 Ga. 285, 96 S. E. 562 (1918); *Jackson* v. *State,* 132 Md. 311, 103 A. 910 (1918); *Clinard* v. *Winston-Salem,* 217 N. C. 119, 6 S. E. 2d 867 (1940); *Allen* v. *Oklahoma City,* 175 Okla. 421, 52 P. 2d 1054 (1936); *Liberty Annex Corp.* v. *Dallas,* 289 S. W. 1067 (Tex. Civ. App. 1927); *Irvine* v. *Clifton Forge,* 124 Va. 781, 97 S. E. 310 (1918).

[12] And see *United States* v. *Harris,* 106 U. S. 629 (1883); *United States* v. *Cruikshank,* 92 U. S. 542 (1876).

terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In *Ex parte Virginia,* 100 U. S. 339, 347 (1880), the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the *Civil Rights Cases,* 109 U. S. 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is em-

ployed no less than eighteen times during the course of that opinion.[13]

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining* v. *New Jersey,* 211 U. S. 78, 90–91 (1908), the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 680 (1930), the Court, through Mr. Justice Brandeis, stated: "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." Further examples of such declarations in the opinions of this Court are not lacking.[14]

One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state

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[13] Among the phrases appearing in the opinion are the following: "the operation of State laws, and the action of State officers executive or judicial"; "State laws and State proceedings"; "State law . . . or some State action through its officers or agents"; "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; "such acts and proceedings as the States may commit or take"; "State legislation or action"; "State law or State authority."

[14] *Neal* v. *Delaware,* 103 U. S. 370, 397 (1881); *Scott* v. *McNeal,* 154 U. S. 34, 45 (1894); *Chicago, Burlington and Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 233–235 (1897); *Hovey* v. *Elliott,* 167 U. S. 409, 417–418 (1897); *Carter* v. *Texas,* 177 U. S. 442, 447 (1900); *Martin* v. *Texas,* 200 U. S. 316, 319 (1906); *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35–36 (1907); *Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 286–287 (1913); *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 548 (1922); *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269, 274 (1927); *Mooney* v. *Holohan,* 294 U. S. 103, 112–113 (1935); *Hansberry* v. *Lee,* 311 U. S. 32, 41 (1940).

judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in *Ex parte Virginia, supra,* held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra.* Cf. *Pennoyer* v. *Neff,* 95 U. S. 714 (1878).[15]

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. *Moore* v. *Dempsey,* 261 U. S. 86 (1923). And see *Frank* v. *Mangum,* 237 U. S. 309 (1915). Convictions obtained by

[15] And see *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281–282 (1912); *Hansberry* v. *Lee,* 311 U. S. 32 (1940).

coerced confessions,[16] by the use of perjured testimony known by the prosecution to be such,[17] or without the effective assistance of counsel,[18] have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.[19] Thus, in *American Federation of Labor* v. *Swing,* 312 U. S. 321 (1941), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion.[20] In *Cantwell* v. *Connecticut,* 310 U. S. 296

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[16] *Brown* v. *Mississippi,* 297 U. S. 278 (1936); *Chambers* v. *Florida,* 309 U. S. 227 (1940); *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944); *Lee* v. *Mississippi,* 332 U. S. 742 (1948).

[17] See *Mooney* v. *Holohan,* 294 U. S. 103 (1935); *Pyle* v. *Kansas,* 317 U. S. 213 (1942).

[18] *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Williams* v. *Kaiser,* 323 U. S. 471 (1945); *Tomkins* v. *Missouri,* 323 U. S. 485 (1945); *De Meerleer* v. *Michigan,* 329 U. S. 663 (1947).

[19] In applying the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.

[20] And see *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769 (1942); *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293 (1943).

(1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges* v. *California,* 314 U. S. 252 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment.[21] And cf. *Chicago, Burlington and Quincy R. Co.* v. *Chicago,* 166 U. S. 226 (1897).

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

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[21] And see *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Craig* v. *Harney,* 331 U. S. 367 (1947).

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions.[22] In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for

[22] See *Swain* v. *Maxwell,* 355 Mo. 448, 196 S. W. 2d 780 (1946); *Koehler* v. *Rowland,* 275 Mo. 573, 205 S. W. 217 (1918). See also *Parmalee* v. *Morris,* 218 Mich. 625, 188 N. W. 330 (1922). Cf. *Porter* v. *Barrett,* 233 Mich. 373, 206 N. W. 532 (1925).

want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court.[23] The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy.[24] Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or

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[23] Cf. *Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913); *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20 (1907).

[24] *Bridges* v. *California,* 314 U. S. 252 (1941); *American Federation of Labor* v. *Swing,* 312 U. S. 321 (1941).

color.[25] The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." [26] *Strauder* v. *West Virginia, supra* at 307. Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama* v. *California,* 332 U. S. 633 (1948). Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power.[27] Cf. *Buchanan* v. *Warley, supra.*

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.[28] This contention does

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[25] See *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880); *Truax* v. *Raich,* 239 U. S. 33 (1915).

[26] Restrictive agreements of the sort involved in these cases have been used to exclude other than Negroes from the ownership or occupancy of real property. We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.

[27] See *Bridges* v. *California,* 314 U. S. 252, 261 (1941); *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308 (1940).

[28] It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the *Buchanan, Harmon* and *Deans* cases, cited *supra,* and declared by this Court to be inconsistent with the requirements of the Fourteenth Amendment, applied equally to white persons and Negroes.

not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.[29] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U S. 501 (1946).

The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution,

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[29] *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.,* 235 U. S. 151, 161–162 (1914); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Oyama* v. *California,* 332 U. S. 633 (1948).

and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare.

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.[30] Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

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[30] *Slaughter-House Cases,* 16 Wall. 36, 81 (1873); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). See Flack, The Adoption of the Fourteenth Amendment.

HURD ET UX. *v.* HODGE ET AL.

NO. 290. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.*

Argued January 15–16, 1948.—Decided May 3, 1948.

1. Covenants incorporated in private conveyances of real estate in the District of Columbia which forbid the rental, lease, sale, transfer or conveyance of the land to any Negro are valid; but their enforcement by the courts of the District of Columbia is prohibited by R. S. § 1978 guaranteeing to all citizens of the United States equal rights to inherit, purchase, lease, sell, hold and convey real and personal property. Pp. 30–34.

   (a) The District of Columbia is included in the phrase "every State and Territory," as used in R. S. § 1978. P. 31.

   (b) Congress has the constitutional power to enact such legislation for the District of Columbia. P. 31.

   (c) The action toward which R. S. § 1978 is directed is governmental action; and it does not invalidate private agreements, so long as their purpose is achieved through voluntary adherence to their terms. P. 31.

   (d) Judicial enforcement of such discriminatory covenants is prohibited by R. S. § 1978, which is derived from the Civil Rights Act and closely related to the Fourteenth Amendment. Pp. 31–34.
2. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Pp. 34–35.
3. Even in the absence of a statute such as R. S. § 1978, it is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts by the equal protection clause of the Fourteenth Amendment. Pp. 34–36.

82 U. S. App. D. C. 180, 162 F. 2d 233, reversed.

The United States Court of Appeals for the District of Columbia affirmed a judgment of the District Court

*Together with No. 291, *Urciolo et al.* v. *Hodge et al.*, also on certiorari to the same court.

decreeing enforcement of a covenant incorporated in conveyances of land and forbidding its rental, lease, sale, transfer or conveyance to any Negro. 82 U. S. App. D. C. 180, 162 F. 2d 233. This Court granted certiorari. 332 U. S. 789. *Reversed,* p. 36.

Charles H. Houston and *Phineas Indritz* argued the cause for petitioners. With them on the brief was *Spottswood W. Robinson, III.*

By special leave of Court, *Solicitor General Perlman* argued the cause for the United States, as *amicus curiae,* supporting petitioners. With him on the brief was *Attorney General Clark.*

Henry Gilligan and *James A. Crooks* argued the cause and filed a brief for respondents.

Briefs of *amici curiae* supporting petitioners were filed by *A. L. Wirin, Saburo Kido* and *Fred Okrand* for the Japanese American Citizens League; *Robert W. Kenny, O. John Rogge* and *Mozart G. Ratner* for the National Lawyers Guild; *Lee Pressman, Eugene Cotton, Frank Donner, John J. Abt, Leon M. Despres, M. H. Goldstein, Isadore Katz, David Rein, Samuel L. Rothbard, Harry Sacher, William Standard* and *Lindsay P. Walden* for the Congress of Industrial Organizations et al.; *Phineas Indritz, Irving R. M. Panzer* and *Richard A. Solomon* for the American Veterans Committee; *William Maslow, Shad Polier, Joseph B. Robison, Byron S. Miller* and *William Strong* for the American Jewish Congress; *Joseph M. Proskauer* and *Jacob Grumet* for the American Jewish Committee et al.; *William Strong* for the American Indian Citizens League of California, Inc.; *Francis M. Dent, Walter M. Nelson, Eugene H. Buder, Victor B. Harris, Luther Ely Smith* and *Harold I. Kahen* for the American Civil Liberties Union; *Herbert S. Thatcher* and

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Robert A. Wilson for the American Federation of Labor; *Earl B. Dickerson, Richard E. Westbrooks* and *Loring B. Moore* for the National Bar Association; *Alger Hiss, Joseph M. Proskauer* and *Victor Elting* for the American Association for the United Nations; and *Edward C. Park* and *Frank B. Frederick* for the American Unitarian Association.

Briefs of *amici curiae* supporting respondents were filed by *E. Hilton Jackson* and *John W. Jackson* for the Federation of Citizens Associations of the District of Columbia et al.; and *Thomas F. Cadwalader* and *Carlyle Barton* for the Mount Royal Protective Association, Inc.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These are companion cases to *Shelley* v. *Kraemer* and *McGhee* v. *Sipes, ante,* p. 1, and come to this Court on certiorari to the United States Court of Appeals for the District of Columbia.

In 1906, twenty of thirty-one lots in the 100 block of Bryant Street, Northwest, in the City of Washington, were sold subject to the following covenant:

> ". . . that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars ($2,000), which shall be a lien against said property."

The covenant imposes no time limitation on the restriction.

Prior to the sales which gave rise to these cases, the twenty lots which are subject to the covenants were at all times owned and occupied by white persons, except for a brief period when three of the houses were occupied by Negroes who were eventually induced to move without

legal action. The remaining eleven lots in the same block,[1] however, are not subject to a restrictive agreement and, as found by the District Court, were occupied by Negroes for the twenty years prior to the institution of this litigation.

These cases involve seven of the twenty lots which are subject to the terms of the restrictive covenants. In No. 290, petitioners Hurd, found by the trial court to be Negroes,[2] purchased one of the restricted properties from the white owners. In No. 291, petitioner Urciolo, a white real estate dealer, sold and conveyed three of the restricted properties to the Negro petitioners Rowe, Savage, and Stewart. Petitioner Urciolo also owns three other lots in the block subject to the covenants. In both cases, the Negro petitioners are presently occupying as homes the respective properties which have been conveyed to them.

Suits were instituted in the District Court by respondents, who own other property in the block subject to the terms of the covenants, praying for injunctive relief to enforce the terms of the restrictive agreement. The cases were consolidated for trial, and after a hearing, the court entered a judgment declaring null and void the deeds of the Negro petitioners; enjoining petitioner Urciolo and one Ryan, the white property owners who had sold the houses to the Negro petitioners, from leasing, selling or conveying the properties to any Negro or colored person; enjoining the Negro petitioners from leasing or conveying the properties and directing those petitioners "to remove themselves and all of their personal belongings" from the premises within sixty days.

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[1] All of the residential property in the block is on the south side of the street, the northern side of the street providing a boundary for a public park.

[2] Petitioner James M. Hurd maintained that he is not a Negro but a Mohawk Indian.

The United States Court of Appeals for the District of Columbia, with one justice dissenting, affirmed the judgment of the District Court.[3] The majority of the court was of the opinion that the action of the District Court was consistent with earlier decisions of the Court of Appeals and that those decisions should be held determinative in these cases.

Petitioners have attacked the judicial enforcement of the restrictive covenants in these cases on a wide variety of grounds. Primary reliance, however, is placed on the contention that such governmental action on the part of the courts of the District of Columbia is forbidden by the due process clause of the Fifth Amendment of the Federal Constitution.[4]

Whether judicial enforcement of racial restrictive agreements by the federal courts of the District of Columbia violates the Fifth Amendment has never been adjudicated by this Court. In *Corrigan* v. *Buckley,* 271 U. S. 323 (1926), an appeal was taken to this Court from a judgment of the United States Court of Appeals for the District of Columbia which had affirmed an order of the lower court granting enforcement to a restrictive covenant. But as was pointed out in our opinion in *Shelley* v. *Kraemer, supra,* the only constitutional issue which had been raised in the lower courts in the *Corrigan* case, and, consequently, the only constitutional question before this Court on appeal, related to the validity of the private agreements as such. Nothing in the opinion

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[3] 82 U. S. App. D. C. 180, 162 F. 2d 233 (1947).

[4] Other contentions made by petitioners include the following: judicial enforcement of the covenants is contrary to § 1978 of the Revised Statutes, derived from the Civil Rights Act of 1866, and to treaty obligations of the United States contained in the United Nations' charter; enforcement of the covenants is contrary to the public policy; enforcement of the covenants is inequitable.

of this Court in that case, therefore, may properly be regarded as an adjudication of the issue presented by petitioners in this case which concerns, not the validity of the restrictive agreements standing alone, but the validity of court enforcement of the restrictive covenants under the due process clause of the Fifth Amendment.[5] See *Shelley* v. *Kraemer, supra* at p. 8.

This Court has declared invalid municipal ordinances restricting occupancy in designated areas to persons of specified race and color as denying rights of white sellers and Negro purchasers of property, guaranteed by the due process clause of the Fourteenth Amendment. *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Harmon* v. *Tyler,* 273 U. S. 668 (1927); *Richmond* v. *Deans,* 281 U. S. 704 (1930). Petitioners urge that judicial enforcement of the restrictive covenants by courts of the District of Columbia should likewise be held to deny rights of

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[5] Prior to the present litigation, the United States Court of Appeals for the District of Columbia had considered cases involving enforcement of racial restrictive agreements on at least eight occasions. *Corrigan* v. *Buckley,* 55 App. D. C. 30, 299 F. 899 (1924); *Torrey* v. *Wolfes,* 56 App. D. C. 4, 6 F. 2d 702 (1925); *Russell* v. *Wallace,* 58 App. D. C. 357, 30 F. 2d 981 (1929); *Cornish* v. *O'Donoghue,* 58 App. D. C. 359, 30 F. 2d 983 (1929); *Grady* v. *Garland,* 67 App. D. C. 73, 89 F. 2d 817 (1937); *Hundley* v. *Gorewitz,* 77 U. S. App. D. C. 48, 132 F. 2d 23 (1942); *Mays* v. *Burgess,* 79 U. S. App. D. C. 343, 147 F. 2d 869 (1945); *Mays* v. *Burgess,* 80 U. S. App. D. C. 236, 152 F. 2d 123 (1945).

In *Corrigan* v. *Buckley, supra,* the first of the cases decided by the United States Court of Appeals and relied on in most of the subsequent decisions, the opinion of the court contains no consideration of the specific issues presented to this Court in these cases. An appeal from the decision in *Corrigan* v. *Buckley* was dismissed by this Court. 271 U. S. 323 (1926). See discussion *supra.* In *Hundley* v. *Gorewitz, supra,* the United States Court of Appeals refused enforcement of a restrictive agreement where changes in the character of the neighborhood would have rendered enforcement inequitable.

white sellers and Negro purchasers of property, guaranteed by the due process clause of the Fifth Amendment. Petitioners point out that this Court in *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943), reached its decision in a case in which issues under the Fifth Amendment were presented, on the assumption that "racial discriminations are in most circumstances irrelevant and therefore prohibited . . . ." And see *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944).

Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereinafter stated.[6]

Section 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866,[7] provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is en-

[6] It is a well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case. Recent expressions of that policy are to be found in *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129 (1946); *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

[7] 14 Stat. 27. Section 1 of the Act provided: ". . . That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment,

joyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [8]

All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt that, for the purposes of this section, the District of Columbia is included within the phrase "every State and Territory." [9] Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia.[10]

We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of *Corrigan* v. *Buckley, supra.*

In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which

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pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, 16 Stat. 144, passed subsequent to the adoption of the Fourteenth Amendment. Section 1977 of the Revised Statutes (8 U. S. C. § 41), derived from § 16 of the Act of 1870, which in turn was patterned after § 1 of the Civil Rights Act of 1866, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[8] 8 U. S. C. § 42.

[9] Cf. *Talbott* v. *Silver Bow County,* 139 U. S. 438, 444 (1891).

[10] See *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 442–443 (1923).

the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress.[11] Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment.[12] It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land.[13] Others supported the adoption of the Amendment in order to eliminate

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[11] The Civil Rights Act of 1866 became law on April 9, 1866. The Joint Resolution submitting the Fourteenth Amendment to the States passed the House of Representatives on June 13, 1866, having previously passed the Senate on June 8. Cong. Globe, 39th Cong., 1st Sess. 3148–3149, 3042.

[12] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess. 2459, 2461, 2462, 2465, 2467, 2498, 2506, 2511, 2538, 2896, 2961, 3035.

[13] Thus, Mr. Thayer of Pennsylvania, speaking in the House of Representatives, stated: "As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, . . . in order . . . that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States." Cong. Globe, 39th Cong., 1st Sess. 2465. And note the remarks of Mr. Stevens of Pennsylvania

doubt as to the constitutional validity of the Civil Rights Act as applied to the States.[14]

The close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment was given specific recognition by this Court in *Buchanan* v. *Warley, supra* at 79. There, the Court observed that, not only through the operation of the Fourteenth Amendment, but also by virtue of the "statutes enacted in furtherance of its purpose," including the provisions here considered, a colored man is granted the right to acquire property free from interference by discriminatory state legislation. In *Shelley* v. *Kraemer, supra,* we have held that the Fourteenth Amendment also forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants. That holding is clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the Courts of the District of Columbia.

Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that judicial

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in reporting to the House the joint resolution which was subsequently adopted as the Fourteenth Amendment. *Id.* at 2459. See also *id.* at 2462, 2896, 2961. That such was understood to be a primary purpose of the Amendment is made clear not only from statements of the proponents of the Amendment but of its opponents. *Id.* at 2467, 2538. See Flack, The Adoption of the Fourteenth Amendment 94–96.

[14] No doubts were expressed as to the constitutionality of the Civil Rights Act in its application to the District of Columbia. Senator Poland of Vermont stated: "It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress." Cong. Globe, 39th Cong., 1st Sess. 2961. See also *id.* at 2461, 2498, 2506, 2511, 2896, 3035.

enforcement of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act. That statute, by its terms, requires that all citizens of the United States shall have the same right "as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." That the Negro petitioners have been denied that right by virtue of the action of the federal courts of the District is clear. The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. White sellers, one of whom is a petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold, and convey real property is to reject the plain meaning of language. We hold that the action of the District Court directed against the Negro purchasers and the white sellers denies rights intended by Congress to be protected by the Civil Rights Act and that, consequently, the action cannot stand.

But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States,[15] and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia.[16] The power of the federal courts to en-

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[15] See *United States* v. *Hutcheson*, 312 U. S. 219, 235 (1941); *Johnson* v. *United States*, 163 F. 30, 32 (1908).

[16] Section 240 (a) of the Judicial Code, 43 Stat. 938, 28 U. S. C. § 347 (a), provides: "In any case, civil or criminal, in a circuit court

force the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.[17] Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[18]

We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws.[19] We cannot presume that the public policy of the United States manifests a lesser concern for the protection

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of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

[17] *Muschany* v. *United States,* 324 U. S. 49, 66 (1945). And see *License Tax Cases,* 5 Wall. 462, 469 (1867).

[18] Cf. *Kennett* v. *Chambers,* 14 How. 38 (1852); *Tool Co.* v. *Norris,* 2 Wall. 45 (1865); *Sprott* v. *United States,* 20 Wall. 459 (1874); *Trist* v. *Child,* 21 Wall. 441 (1875); *Oscanyan* v. *Arms Co.,* 103 U. S. 261 (1881); *Burt* v. *Union Central Life Insurance Co.,* 187 U. S. 362 (1902); *Sage* v. *Hampe,* 235 U. S. 99 (1914). And see *Beasley* v. *Texas & Pacific R. Co.,* 191 U. S. 492 (1903).

[19] Cf. *Gandolfo* v. *Hartman,* 49 F. 181, 183 (1892).

of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, concurring.

In these cases, the plaintiffs ask equity to enjoin white property owners who are desirous of selling their houses to Negro buyers simply because the houses were subject to an original agreement not to have them pass into Negro ownership. Equity is rooted in conscience. An injunction is, as it always has been, "an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." *Morrison* v. *Work,* 266 U. S. 481, 490. In good conscience, it cannot be "the exercise of a sound judicial discretion" by a federal court to grant the relief here asked for when the authorization of such an injunction by the States of the Union violates the Constitution—and violates it, not for any narrow technical reason, but for considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution. This is to me a sufficient and conclusive ground for reaching the Court's result.

Syllabus.

FEDERAL TRADE COMMISSION v. MORTON SALT CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 464. Argued March 10, 1948.—Decided May 3, 1948.

Respondent sells table salt in interstate commerce to wholesalers and retailers on a quantity discount basis. The Federal Trade Commission, after a hearing, found that respondent had discriminated in price between different purchasers of like grades and qualities, in violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act, and issued a cease-and-desist order. *Held:*

1. Respondent's quantity discounts discriminate in price within the meaning of the Act, and are prohibited where they have the proscribed effect on competition. Pp. 42–44.

2. The legislative history of the Robinson-Patman Act shows that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the former's quantity purchasing power; and the Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity production, delivery or sale, or by reason of the seller's good faith effort to meet the equally low price of a competitor. Pp. 43–44.

3. Under the Act the burden is upon the seller to prove that its quantity discount differentials were justified by cost savings; to establish the existence of a "discrimination in price" in a case involving competitive injury between a seller's customers, the Commission need only prove that the seller has charged one purchaser a higher price for like goods than he has charged one or more of the purchaser's competitors. Pp. 44–45.

4. The Act does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility they may have that effect. P. 46.

5. The Commission's finding that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay constitutes a sufficient showing of injury to competition. Pp. 46–47.

6. The Commission's findings of injury to competition were adequately supported by the evidence. Pp. 47–51.

(a) The evidence that respondent's quantity discounts resulted in price differentials between competing purchasers sufficient in amount to influence their resale price was in itself adequate to support the findings that the effect of such price discriminations "may be substantially to lessen competition . . . and to injure, destroy, and prevent competition." P. 47.

(b) The evidence was adequate to support the Commission's findings of reasonably possible injury to competition from respondent's price differentials between competing carload and less-than-carload purchasers. Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost; but here the respondent failed to make such proof. Pp. 47–48.

(c) The fact that respondent's less-than-carload sales are very small in comparison with the total volume of its business, and the fact that salt is a small item in most wholesale and retail businesses and in consumers' budgets, do not require rejection of the Commission's finding that the effect of the carload discrimination may substantially lessen competition and may injure competition between purchasers who are granted and those who are denied this discriminatory discount. Pp. 48–50.

(d) The possibility that enforcement of the Commission's order might lead respondent to increase prices to its carload purchasers cannot justify refusal of the reviewing court to decree enforcement. P. 50.

(e) It is self-evident that there is a "reasonable possibility" that competition may be adversely affected by a practice whereby manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to competitors of such customers. P. 50.

7. With the exception of certain provisos which this Court rejects, the cease-and-desist order of the Commission is sustained. Pp. 51–55.

(a) The Commission's order, so far as here approved, is specifically aimed at the pricing practices found unlawful, and is neither too broad nor contrary to the principle of *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426. Pp. 51–52.

(b) Provisions of the order which forbid respondent from selling its product, regardless of quantities, to some wholesalers and retailers at a price different from that which it charged com-

peting wholesalers and retailers for the same grade, are here approved. Pp. 52–53.

(c) Provisos permitting 5-cents-per-case differentials if they do not "tend to lessen, injure, or destroy competition" are here rejected because the qualifying clause tends to shift to the courts a responsibility in enforcement proceedings which Congress has primarily entrusted to the Commission. Pp. 53–55.

(d) Section 2 (a) of the Act authorizes a provision of the order forbidding sales by respondent to any retailer at prices lower than those charged wholesalers whose customers compete with such retailer. P. 55.

8. On remand of the cause, the Commission should have an opportunity to reconsider the provisos in its order which permit 5-cents-per-case differentials in the light of this Court's rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary. P. 55.

162 F. 2d 949, reversed.

A cease-and-desist order issued by the Federal Trade Commission in a proceeding against respondent under the amended Clayton Act, to terminate alleged unlawful price discriminations, 39 F. T. C. 35, was set aside by the Circuit Court of Appeals. 162 F. 2d 949. This Court granted certiorari. 332 U. S. 850. *Reversed and remanded,* p. 55.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett* and *W. T. Kelley.*

Lloyd M. McBride argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Federal Trade Commission, after a hearing, found that the respondent, which manufactures and sells table salt in interstate commerce, had discriminated in price between different purchasers of like grades and qualities, and concluded that such discriminations were in violation

of § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13.[1] It accordingly issued a cease and desist order. 39 F. T. C. 35.[2] Upon petition of the respondent the Circuit Court of Appeals, with one judge dissenting, set aside the Commission's findings and order, directed the Commission to dismiss its complaint against respondent, and denied a cross petition of the Commission for enforcement of its order. 162 F. 2d 949. The Court's judgment rested on its construction of the Act, its holding that crucial findings of the Commission were either not supported by evidence or were contrary to the evidence, and its conclusion that the Commission's order was too broad. Since questions of importance in the construction and administration of the Act were presented, we granted certiorari. 332 U. S. 850. Disposition of these questions requires only a brief narration of the facts.

Respondent manufactures several different brands of table salt[3] and sells them directly to (1) wholesalers or

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[1] Section 2 (a) provides in part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

[2] The original findings and order were modified by the Commission on its own motion. The controversy here deals only with the findings and order as modified.

[3] Respondent also produces and sells other kinds of salt, but the trade practices here involved only relate to table salt.

jobbers, who in turn resell to the retail trade, and (2) large retailers, including chain store retailers. Respondent sells its finest brand of table salt, known as Blue Label, on what it terms a standard quantity discount system available to all customers. Under this system the purchasers pay a delivered price and the cost to both wholesale and retail purchasers of this brand differs according to the quantities bought. These prices are as follows, after making allowance for rebates and discounts:

	Per case
Less-than-carload purchases	$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive 12 months	1.40
50,000-case purchases in any consecutive 12 months	1.35

Only five companies have ever bought sufficient quantities of respondent's salt to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country.[4] As a result of this low price these five companies have been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.

Respondent's table salts, other than Blue Label, are also sold under a quantity discount system differing slightly from that used in selling Blue Label. Sales of these other brands in less-than-carload lots are made at list price plus freight from plant to destination. Carload purchasers are granted approximately a 5 per cent discount; approximately a 10 per cent discount is granted to purchasers who buy as much as $50,000 worth of all brands of salt in any consecutive twelve-month period.

[4] These chain stores are American Stores Company, National Tea Company, Kroger Grocery Co., Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company.

Respondent's quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused.

In addition to these standard quantity discounts, special allowances were granted certain favored customers who competed with other customers to whom they were denied.[5]

First. Respondent's basic contention, which it argues this case hinges upon, is that its "standard quantity discounts, available to all on equal terms, as contrasted, for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory within the meaning of the Robinson-Patman Act." Theoretically, these discounts are equally available to all, but functionally they are not. For as the record indicates (if reference to it on this point were necessary) no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some of

[5] One such customer, a wholesaler, received a special discount of 7½ cents per case on purchases of carload lots of Blue Label Salt. Respondent sold to this wholesaler at $1.42½ per case, although competing wholesalers were required to pay $1.50 per case on carload lots. The Circuit Court of Appeals held that findings of the Commission on these special allowances were supported by substantial evidence, that they were not maintained to meet lower prices of respondent's competitors, and that the allowances were discriminatory. It nevertheless set the findings aside on the ground that the Commission's finding of injury to competition from the discriminations engaged in by respondent was too general and had little evidence to support it. We think the finding and supporting evidence of injury to competition on account of these special allowances are similar to the finding and evidence with reference to the quantity discount system and need not be separately treated.

their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts, even those based on carload shipments. The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Section 2 of the original Clayton Act had included a proviso that nothing contained in it should prevent "discrimination in price . . . on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation . . . ." That section has been construed as permitting quantity discounts, such as those here, without regard to the amount of the seller's actual savings in cost attributable to quantity sales or quantity deliveries. *Goodyear Tire & Rubber Co.* v. *Federal Trade Comm'n,* 101 F. 2d 620. The House Committee Report on the Robinson-Patman Act considered that the Clayton Act's proviso allowing quantity discounts so weakened § 2 "as to render it inadequate, if not almost a nullity." [6] The Committee considered the present Robinson-Patman amendment to § 2 "of great importance." Its purpose was to limit "the use of quantity price differentials to the sphere of actual cost differences. Otherwise," the report continued, "such differentials would become instruments of favor and privilege and weapons of com-

[6] H. R. Rep. No. 2287, 74th Cong., 2d Sess. 7.

petitive oppression." [7] The Senate Committee reporting the bill emphasized the same purpose,[8] as did the Congressman in charge of the Conference Report when explaining it to the House just before final passage.[9] And it was in furtherance of this avowed purpose—to protect competition from all price differentials except those based in full on cost savings—that § 2 (a) of the amendment provided "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The foregoing references, without regard to others which could be mentioned, establish that respondent's standard quantity discounts are discriminatory within the meaning of the Act, and are prohibited by it whenever they have the defined effect on competition. See *Federal Trade Comm'n* v. *Staley Co.*, 324 U. S. 746, 751.

Second. The Government interprets the opinion of the Circuit Court of Appeals as having held that in order to establish "discrimination in price" under the Act the burden rested on the Commission to prove that respondent's quantity discount differentials were not justified by its cost savings.[10] Respondent does not so understand the Court of Appeals decision, and furthermore admits that no such burden rests on the Commission. We agree that it does not. First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute

[7] *Id.* at 9.

[8] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 4–6.

[9] 80 Cong. Rec. 9417.

[10] See 42 Ill. L. Rev. 556–561; 15 U. of Chi. L. Rev. 384–391; 60 Harv. L. Rev. 1167–1169.

generally rests on one who claims its benefits,[11] requires that respondent undertake this proof under the proviso of § 2 (a). Secondly, § 2 (b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2 (a) throw "upon any who claim the benefit of those exceptions the burden of showing that their case falls within them." [12] We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.[13] This construction is consistent with the first sentence of § 2 (a) in which it is made unlawful "to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

Third. It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused

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[11] *Javierre* v. *Central Altagracia,* 217 U. S. 502, 507–508 and cases cited.

[12] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also 80 Cong. Rec. 3599, 8241, 9418.

[13] See *Moss, Inc.* v. *Federal Trade Comm'n,* 148 F. 2d 378, 379, holding that proof of a price differential in itself constituted "discrimination in price," where the competitive injury in question was between sellers. See also *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 721–726.

injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, 742.[14] Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods

[14] This language is to be read also in the light of the following statement in the same case, discussing the meaning of § 2 (a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act:

"It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357. But as was held in the *Standard Fashion* case, *supra,* with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." 324 U. S. at 738; see also *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 411.

The Committee Reports and Congressional debate on this provision of the Robinson-Patman Act indicate that it was intended to have a broader scope than the corresponding provision of the old Clayton Act. See note 18 *infra.*

than their competitors had to pay. The findings are adequate.

Fourth. It is urged that the evidence is inadequate to support the Commission's findings of injury to competition.[15] As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory prices upon the "reasonable possibility" that different prices for like goods to competing purchasers may have the defined effect on competition.[16] That respondent's quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale prices of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition . . . and to injure, destroy, and prevent competition."

The adequacy of the evidence to support the Commission's findings of reasonably possible injury to competition from respondent's price differentials between competing carload and less-than-carload purchasers is singled out for special attacks here. It is suggested that in considering the adequacy of the evidence to show injury to competition respondent's carload discounts and its other

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[15] After discussing all of respondent's discriminations, the Commission stated: "The Commission finds that the effect of the discriminations in price, including discounts, rebates, and allowances, generally and specifically described herein may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices, discounts, rebates, and allowances and those to whom they are denied."

[16] The statute outlaws any discrimination the effect of which "may be substantially to lessen competition . . . or to injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

quantity discounts should not be treated alike. The argument is that there is an obvious saving to a seller who delivers goods in carload lots. Assuming this to be true, that fact would not tend to disprove injury to the merchant compelled to pay the less-than-carload price. For a ten-cent carload price differential against a merchant would injure him competitively just as much as a ten-cent differential under any other name. However relevant the separate carload argument might be to the question of justifying a differential by cost savings, it has no relevancy in determining whether the differential works an injury to a competitor. Since Congress has not seen fit to give carload discounts any favored classification we cannot do so. Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof.

It is also argued that respondent's less-than-carload sales are very small in comparison with the total volume of its business [17] and for that reason we should reject the Commission's finding that the effect of the carload discrimination may substantially lessen competition and may injure competition between purchasers who are granted and those who are denied this discriminatory discount. To support this argument, reference is made to the fact

[17] Respondent introduced testimony and exhibits intended to show that only one-tenth of one per cent of its sales were made at less-than-carload prices. It appears that this figure relates only to a single one-year period and was obtained by lumping together statistics on respondent's sales of table salt along with those on sales of its other products, such as salt tablets, coarse rock salt, and sal soda. Since this proceeding is concerned only with discounts on table salts, these figures are of dubious value. Furthermore, they are limited to sales in respondent's Chicago area, whereas respondent carried on a nation-wide business.

that salt is a small item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

Furthermore, in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions . . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."[18] Since there was evidence sufficient to

[18] In explaining this clause of the proposed Robinson-Patman Act, the Senate Judiciary Committee said:

"This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the

show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

Apprehension is expressed in this Court that enforcement of the Commission's order against respondent's continued violations of the Robinson-Patman Act might lead respondent to raise table salt prices to its carload purchasers. Such a conceivable, though, we think, highly improbable, contingency, could afford us no reason for upsetting the Commission's findings and declining to direct compliance with a statute passed by Congress.

The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion

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discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, 74th Cong., 2d Sess. 4. See also H. R. Rep. No. 2287, 74th Cong., 2d Sess. 8; 80 Cong. Rec. 9417.

that the Commission's findings of injury to competition were adequately supported by evidence.

Fifth. The Circuit Court of Appeals held, and respondent here contends, that the order was too sweeping, that it required the respondent to "conduct its business generally at its peril," and that the Commission had exceeded its jurisdiction in entering such an order.[19] Reliance for this contention chiefly rests on *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426. That case held that the Labor Board could not broadly enjoin violations of all the provisions of the statute merely because a single violation of one of the Act's many provisions had been found. *Id.* at 435–436. But it also pointed out that the Labor Board, "Having found the acts which constitute the unfair labor practice . . . is free to restrain the practice and other like or related unlawful acts." It there pointed out that this Court had applied a similar rule to a Federal Trade Commission order in *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U. S. 441, 455. In the latter case the

[19] The prohibiting paragraphs of the order were:

"(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

"(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

"(c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.

"For the purposes of comparison, the term 'price' as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale."

Court not only approved restraint of the unlawful price-fixing practices found, but "any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company." See also *May Dep't Stores Co.* v. *Labor Board,* 326 U. S. 376, 392–393. We think the Commission's order here, save for the provisos in (a) and (b) later considered, is specifically aimed at the pricing practices found unlawful, and therefore does not run counter to the holding in the *Express Publishing Co.* case. Certainly the order in its relation to the circumstances of this case is only designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board [Commission] has found to have been committed by the . . . [respondent] in the past." *Labor Board* v. *Express Publishing Co., supra,* 436–437.

The specific restraints of paragraphs (a) and (b) of the order are identical, except that one applies to prices respondent charges wholesalers and the other to prices charged retailers. It is seen that the first part of these paragraphs, preceding the provisos, would absolutely bar respondent from selling its table salt, regardless of quantities, to some wholesalers and retailers at prices different from that which it charged competing wholesalers and retailers for the same grade of salt. The Commission had found that respondent had been continuously engaged in such discriminations through the use of discounts, rebates and allowances. It had further found that respondent had failed to show justification for these differences by reason of a corresponding difference in its costs. Thus the restraints imposed by the Commission upon respondent are concerned with the precise unlawful practices in which it was found to have engaged for a number of years. True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the

order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied. Paragraphs (a) and (b) up to the language of the provisos are approved.

The provisos in (a) and (b) present a more difficult problem. They read: "provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers [retailers]." The first clause of the provisos, but for the second qualifying clause, would unequivocally permit respondent to maintain price differentials of less than five cents as between competing wholesalers and as between competing retailers.[20] This clause would appear to benefit respondent, and no challenge to it, standing alone, is here raised. But respondent seriously objects to the second clause of the proviso which qualifies the permissive less-than-five-cent differentials provided in the first clause. That qualification permits such differentials only if they do "not tend to lessen, injure, or destroy competition." Respondent points out that where a differential tends in no way to injure competition, the Act permits it. "The Commission," so respondent urges, "must either find and rule that a given differential injures competition, and then prohibit it, or it must leave that differential entirely alone." Whether, and under what circumstances, if any, the Commission

[20] The only finding of the Commission specifically relating to five-cent differentials was: "Salt is a staple commodity with a medium turnover and is generally sold by wholesalers to their retail customers on a lower margin of profit than that received on other commodities. Consequently, the price at which the wholesaler offers his table salt is usually controlling, and a difference of five cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase."

might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying clauses require consideration.

One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U. S. C. §§ 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide. But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials it could not then shift to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission.

This leaves for consideration the objection to paragraph (c) of the order which reads: "By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer." The only criticism here urged to (c) is that it bars respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer. Section 2 (a) of the Act specifically authorizes the Commission to bar discriminatory prices which tend to lessen or injure competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This provision plainly supports paragraph (c) of the order.

We sustain the Commission's order with the exception of the provisos in paragraphs (a) and (b) previously set out. Since the qualifying clauses constitute an important limitation to the provisos, we think the Commission should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary. This the Commission may do upon the present evidence and findings or it may hear other evidence and make other findings on this phase of the case, should it conclude to do so. See *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U. S. 212, 218.

The judgment of the Circuit Court of Appeals is reversed and the proceedings are remanded to that court to be disposed of in conformity with this opinion.

Reversed.

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER joins, dissenting in part.

While I agree with much of the Court's opinion, I cannot accept its most significant feature, which is a new interpretation of the Robinson-Patman Act that will

sanction prohibition of any discounts if "there is a reasonable *possibility* that they 'may' have" the effect to wit: to lessen, injure, destroy or prevent competition. [Emphasis supplied.] I think the law as written by the Congress and as always interpreted by this Court requires that the record show a reasonable *probability* of that effect. The difference, as every lawyer knows, is not unimportant and in many cases would be decisive.

The law rarely authorizes judgments on proof of mere possibilities. After careful consideration this Court has, at least three times and as late as 1945, refused to interpret these laws as doing so. In 1922, in *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, at 356, a unanimous Court, construing like language in § 3 of the Clayton Act, said: "But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly."

In 1930, in *International Shoe Company* v. *Federal Trade Commission,* 280 U. S. 291, the Court said (at p. 298) with respect to identical language in § 7 of the Clayton Act: ". . . the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 357 . . ." And Mr. Justice Stone wrote for the dissenting justices (280 U. S. 306): "Nor am I able to say that the McElwain Company . . . was then in such financial straits as to preclude the reasonable inference by the Commission that its business . . . would probably continue to compete with that of petitioner. See *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356–357."

With these interpretations on our books the Robinson-Patman Act was passed.

When the latter Act came before this Court in 1945, this same question was carefully considered and Chief Justice Stone, with the concurrence of all but two members of the Court and with no disagreement noted on this point, wrote:

"It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356–357. But as was held in the *Standard Fashion* case, *supra,* with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." *Corn Products Company* v. *Federal Trade Commission,* 324 U. S. 726, 738.

It is true that later (324 U. S. at 742) the opinion uses the language as to possibility of injury now quoted in part [1] by the Court as the holding of that case. But the phrase appears in such form and context and is so irreconcilable with the earlier careful and complete state-

[1] The full text of the later reference, quoted in part by the Court, is: "As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

It seems obvious that the Court's "as we have said" refers to the earlier statement that the test is "probability" which is quoted in full above, particularly in the absence of any other citation or reference.

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ment, set out above, that the inconsistency must appear to a fair reader as one of those inadvertencies into which the most careful judges sometimes fall. It is the only authority for making a thrice-rejected rule of interpretation a prevailing one. I know of no other instance in which this Court has ever held that administrative orders applying drastic regulation of business practices may hang on so slender a thread of inference.

The Court uses overtones of hostility to all quantity discounts, which I do not find in the Act, but they are translated into a rule which is fatal to any discount the Commission sees fit to attack. To say it is the law that the Commission may strike down any discount "upon the 'reasonable possibility' that different prices for like goods to competing purchasers may" substantially injure competition, coupled with the almost absolute subservience of judicial judgment to administrative experience, cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, means that judicial review is a word of promise to the ear to be broken to the hope. The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not. That is not the law which Congress enacted and which this Court has uniformly stated until today.

The Robinson-Patman Act itself, insofar as it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.

On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods,

made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should, be passed down the line to the consumer. I think the Court's disposition of this case pretty much sanctions an obliteration of the difference between discounts which the Act would foster and those it would condemn.

It will illustrate my point to discuss only two of the discounts involved—two which the Commission and the Court lump together and treat exactly alike, but which to me require under the facts of this case quite different inferences as to their effect on competition.

In addition to a general ten-cent per case carload lot discount, there is what we may call a quota discount, by which customers who purchase 5,000 or more cases in a twelve-month period get a further rebate of 10 cents per case, while those who purchase 50,000 or more cases in such periods get an additional 5 cents per case. The application of this schedule to distribution of the table salt involved is substantially illustrated by one of the Company's exhibits, from which we find:

Cases purchased	*Number customers*	*Discount per case*
1–500	3,643	0
501–4,999	343	0
5,000–10,000	35	.10
10,000–49,999	14	.10
50,000 and over	5	.15

It thus appears that out of approximately 4,000 customers only 54 receive either of these two quota discounts in practice, and the larger one is available to only four or five major chain store organizations. The quota discounts allowed a customer are not related to any apparent difference in handling costs but are based solely on the volume of his purchases, which in turn depends largely on the volume of his sales, and these in turn are surely

influenced by his lowered costs which he can reflect in his retail prices.

I agree that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the Company, which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification. I agree, too, that the results of this system on respondent's customer list is enough to warrant the inference that the effects "may be substantially to lessen competition or tend to create a monopoly."

Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

However, a very different problem is presented by the differential of 10 cents per case when delivered in carload lots. This carload price applies to various small purchasers who pool their orders to make a carload shipment and to all who pick up their orders, no matter how small, at the company warehouses which are maintained in ten cities. The evidence is that less than 1/10 of 1% of the respondent's total salt business fail to get the benefit of this carload-lot discount.

It does not seem to me that one can fairly draw the inference that competition *probably* is affected by the carload-lot discount. Indeed, the discount is so small in proportion to price, salt is so small an item in wholesale or retail business and in the consumer's budget that I should think it farfetched even to find it reasonably *pos-*

sible that competition would be *substantially* affected. Hence, the discount, whether more or less than the exact savings in handling, would not fall under condemnation of the statute. The incidence of this discount on customers is not arbitrarily determined by the volume of their business but depends upon an obvious difference in handling and delivery costs.

The Commission has forbidden respondent to continue this carload-lot differential. The Commission has no power to prescribe prices, so that it can order only that the differential be eliminated. Unless competitive conditions make it impossible, the respondent's self-interest would dictate that it abolish the discount and maintain the higher base price, rather than make the discount universally applicable. The result would be to raise the price of salt 10 cents per case to 99.9% of respondent's customers because 1/10 of 1% were not in a position to accept carload shipments. This is a quite different effect than the elimination of the quota discount.

It seems to me that a discount which gives a lowered cost to so large a proportion of respondent's customers and is withheld only from those whose conditions of delivery obviously impose greater handling costs, does not permit the same inferences of effect on competition as the quota discounts which reduce costs to the few only and that on a basis which ultimately is their size.

The two types of discount involved here seem to me to fall under different purposes of the Act and to require different conclusions of fact as to effect on competition. Accordingly, I should sustain the court below insofar as it sets aside the cease and desist order as to carload-lot discounts.

REPUBLIC NATURAL GAS CO. *v.* OKLAHOMA ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 134. Argued January 6, 1948.—Decided May 3, 1948.

One of two producers of natural gas in the same Oklahoma field was ordered by the State Commission to take gas "ratably" from, and to connect its pipeline with the well of, the other, on terms and conditions to be agreed upon by the parties or to be fixed by the Commission if the parties were unable to agree. The validity under the Federal Constitution of the order and of the state law which authorized it were sustained by the State Supreme Court, which interpreted the order as giving the respondent the choice of taking and paying for the gas, marketing the gas and accounting therefor, or shutting down its own wells. *Held:* The judgment of the State Supreme Court was not "final" within the meaning of § 237 of the Judicial Code, and this Court is therefore without jurisdiction of an appeal therefrom. Pp. 62–72.

198 Okla. 350, 180 P. 2d 1009, appeal dismissed.

An order of the State Corporation Commission of Oklahoma, directing the appellant to take gas ratably from another producer in the same field, was sustained by the State Supreme Court. 198 Okla. 350, 180 P. 2d 1009. An appeal to this Court is here dismissed for the want of a "final" judgment, p. 72.

Robert M. Rainey and *John F. Eberhardt* argued the cause and filed a brief for appellant. *Robert C. Foulston* was also of counsel.

Earl Pruet argued the cause for appellees. With him on the brief were *Mac Q. Williamson,* Attorney General of Oklahoma, and *Floyd Green.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of Oklahoma, arising from an order of the State

Corporation Commission which concerned the correlative rights of owners of natural gas drawn from a common source.

Since 1913, Oklahoma has regulated the extraction of natural gas, partly to prevent waste and partly to avoid excessive drainage as between producers sharing the same pool. The legislation provided that owners might take from a common source amounts of gas proportionate to the natural flow of their respective wells, but not more than 25% of that natural flow without the consent of the Corporation Commission; that any person taking gas away from a gas field, except for certain specified purposes, "shall take ratably from each owner of the gas in proportion to his interest in said gas"; and that such ratable taking was to be upon terms agreed upon by the various well owners, or, in the event of failure to agree, upon terms fixed by the Corporation Commission.[1]

The Hugoton Gas Field is one of the largest in the United States, covering a vast area in several States, including Oklahoma. It was discovered in 1924 or 1925,

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[1] L. 1913, c. 198, §§ 1–3 (Okla. Stat. (1941) tit. 52, §§ 231–33):

"Section 1. All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees, of the surface under which gas is located in its original state.

"Section 2. Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by

but the Oklahoma portion was not developed until 1937. Republic, a Delaware corporation, obtained permission to do business in Oklahoma in 1938, purchased gas leases in this field and drilled wells, removing the gas in its own pipelines. In 1944, the Peerless Oil and Gas Company completed a well in a portion of the gas field otherwise tapped only by Republic. It had no market for the gas obtained from this well, nor means of transporting such gas to any market. It offered to sell the gas to Republic, which refused it. Peerless then applied to the

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proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well.

"Section 3. Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas."

See also L. 1915, c. 197, §§ 4, 5 (Okla. Stat. (1941) tit. 52, §§ 239, 240):

"Section 4. That whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and

Corporation Commission for an order requiring Republic to take such gas from it "ratably"—that is, to take the same proportion of the natural flow of Peerless' well as Republic took of the natural flow of its own wells. After a hearing, the Commission found that the production of natural gas in the Hugoton field was in excess of the market demand; that Republic had qualified to do business in Oklahoma with full knowledge of the existing legislation requiring the ratable taking of natural gas; and that Republic was taking more than its ratable share

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regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.

"Section 5. That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade."

of gas from that portion of the field tapped both by its wells and that belonging to Peerless, thereby draining gas away from Peerless' tract and, in effect, taking property belonging to Peerless. The Commission ordered Republic:

> "1. . . . to take gas ratably from applicant's [Peerless'] well . . ., and to make necessary connection as soon as applicant lays a line connecting said well with respondent's [Republic's] line, and to continue to do so until the further order of this Commission; provided that, applicant shall lay its line from its well to the lines of respondent at some point designated by the respondent, but in said Section 14 in which said well of Peerless Oil and Gas Company has been drilled; and said respondent is required to make said designation immediately and without unreasonable delay, and in event of failure of respondent so to do, respondent shall no longer be permitted to produce any of its wells located in the Hugoton Oklahoma Gas Field.
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> "2. The terms and conditions of such taking of natural gas by Republic Natural Gas Company from said Peerless Oil and Gas Company's well shall be determined and agreed upon by and between applicant and respondent; and in the event said parties are unable to agree, applicant and respondent are hereby granted the right to make further application to the Commission for an order fixing such terms and conditions; and the Commission retains jurisdiction hereof for said purpose."

On appeal, the Oklahoma Supreme Court affirmed, holding that Republic, having been given leave to enter the State on the basis of the legislation governing natural gas production, might not challenge its validity, and that neither the order nor the legislation on which it is based

runs counter to asserted constitutional rights. 198 Okla. 350. The court interpreted the Commission's order as giving Republic "a choice between taking the gas from Peerless and paying therefor direct, or marketing the gas and accounting to Peerless therefor, or to shut in its own production from the same common source of supply." 198 Okla. at 356. Invoking both the Due Process and the Equal Protection clauses of the Fourteenth Amendment, Republic appealed to this Court.

This case raises thorny questions concerning the regulation of fugacious minerals, of moment both to States whose economy is especially involved and to the private enterprises which develop these natural resources. Cf. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 570. Before reaching these constitutional issues, we must determine whether or not we have jurisdiction to do so.

Ever since 1789, Congress has granted this Court the power of review in State litigation only after "the highest court of a State in which a decision in a suit could be had" has rendered a "final judgment or decree." § 237 of the Judicial Code, 28 U. S. C. § 344, rephrasing § 25 of the Act of September 24, 1789, 1 Stat. 73, 85. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations.

No self-enforcing formula defining when a judgment is "final" can be devised. Tests have been indicated

which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce* v. *Tobin,* 245 U. S. 18; *Martinez* v. *International Banking Corp.,* 220 U. S. 214, 223; *Mississippi Central R. Co.* v. *Smith,* 295 U. S. 718. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. *Board of Commissioners* v. *Lucas,* 93 U. S. 108; *Mower* v. *Fletcher,* 114 U. S. 127.

There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing. Cf. *Clark* v. *Williard,* 294 U. S. 211; *Gumbel* v. *Pitkin,* 113 U. S. 545; and compare *Forgay* v. *Conrad,* 6 How. 201, 204, with *Barnard* v. *Gibson,* 7 How. 650, 657. For related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow. In such cases the accounting is deemed a severed controversy and not part of the main case. *Forgay* v. *Conrad, supra; Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362; *Radio Station WOW* v. *Johnson,* 326 U. S. 120. But a decision that a taking by eminent domain is for a public use, where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.,* 243 U. S. 251;

cf. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Catlin* v. *United States*, 324 U. S. 229.[2] One thing is clear. The considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.

On which side of the line, however faint and faltering at times, dividing judgments that were deemed "final" from those found not to be so, does the judgment before us fall? The order of the Oklahoma Corporation Commission, as affirmed below, terminates some but not all issues in this proceeding. Republic is required to take ratably from Peerless, but it may do so in any one of three ways. If, as is most probable, Republic would choose not to close down its own wells, under the Commission's order it must allow Peerless to connect its well to Republic's pipeline. But there has been left open for later determination, in event of failure to reach agreement, the terms upon which Republic must take the gas, the rates which it must pay on purchase, or may charge if it sells as agent of Peerless. Does either its alternative character, or the fact that it leaves matters still open for determination, so qualify the order as to make it short of "final" for present review?

We turn first to the latter point. Certainly what remains to be done cannot be characterized as merely "ministerial." Whether or not the amount of gas to be taken by Republic from Peerless can be ascertained through application of a formula, the determination of the

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[2] In the *Catlin* case our decision was based on the general rule that condemnation orders prior to determination of just compensation are not appealable. The wartime statutes there involved were urged by the claimants as a reason for not applying the general rule. We rejected this contention.

price to be paid for the gas if purchased, or the fees to be paid to Republic for marketing it if sold on behalf of Peerless, clearly requires the exercise of judgment.[3] Nor is there any immediate threat of irreparable damage to Republic, rendering postponed review so illusory as to make the decree "final" now or never. The Commission's order requires Republic to designate a point on its pipeline at which Peerless might attach a line, and after Peerless had done so to connect it immediately. But it does not appear that the order requires Republic to commence taking Peerless' gas before the terms of taking have either been agreed upon or ordered by the Commission. Nor does it appear that Republic would have to bear the expense of connecting the pipeline, nor that such expense would be substantial. Indeed, the incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–52. But even if the Commission's order were construed to require Republic to take and dispose of Peerless' gas immediately—and we are not so advised by the State court—there is no ground for assuming that any loss that Republic might incur could not be recovered should the completed direction of the Oklahoma Commission, on affirmance by that State's Supreme Court, ultimately be found to be unconstitutional. Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of

[3] This case is unlike those in which a rate had been fixed, subject to a continuing jurisdiction to modify it later. Cf. *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548; *St. Louis, Iron Mountain & Southern R. Co.* v. *Southern Express Co.*, 108 U. S. 24. Here, no rates have been set, and their future establishment has been left open.

affirmatively establishing this Court's jurisdiction. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 345, 348.

The condemnation precedents attract this case more persuasively than do the accounting cases. Where it is claimed that a decree transferring property overrides an asserted federal right, as in *Forgay* v. *Conrad, supra,* and *Radio Station WOW* v. *Johnson, supra,* no disposition of the subsequent accounting proceeding can possibly make up for the defeated party's loss, since the party who has lost the property must also pay to his opponent what the accounting decrees. Hence his desire to appeal the issue of the right to the property will almost certainly persist. On the other hand, in an eminent domain case, as in a case like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation. An adequate award in an eminent domain case or a profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. It is of course not our province to discourage appeals. But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop. Another similarity between this case and the condemnation cases calls for abstention until what is organically one litigation has been concluded in the State. It is that the matters left open may generate additional federal questions. This brings into vivid relevance the policy against fragmentary review. In accounting cases, that which still remains to be litigated can scarcely give rise to new federal questions.

The policy against fragmentary review has therefore little bearing. But contests over valuation in eminent domain cases, as price-fixing in this type of case, are inherently provocative of constitutional claims. This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here.

In short, the guiding considerations for determining whether the decree of the court below possesses requisite finality lead to the conclusion that this case must await its culmination in the judicial process of the State before we can assume jurisdiction. "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court." *Collins* v. *Miller,* 252 U. S. 364, 371. This makes it unnecessary to consider whether the mere fact that the decree gave alternative commands precluded it from being final. Cf. *Paducah* v. *East Tennessee Tel. Co.,* 229 U. S. 476; *Jones's Adm'r* v. *Craig,* 127 U. S. 213; Note, 48 Harv. L. Rev. 302, 305–306. Since the judgment now appealed from lacks the necessary finality, we cannot consider the merits. All of Republic's constitutional objections are of course saved.

Appeal dismissed.

MR. JUSTICE DOUGLAS, concurring.

The judgment of the Oklahoma court is not "final" merely because it establishes that Republic has no right to drain away the Peerless gas without paying for it. I think it would be conceded that, even so, the judgment would not be "final" if it offered appellant three alternative ways to comply and there were doubts as to the constitutionality of any one of them. Then we would wait

to see which of the alternatives was ultimately selected or imposed before reviewing the constitutionality of any of them. But there would be no more reason to defer decision on the merits in that case than in this. For the constitutional questions would be isolated in each and we would be as uncertain in one as in the other which of the alternatives would actually apply to appellant. And the principle seems to me to be the same even when a majority of us would sustain the order whatever alternative was chosen as its sanction.

There is, of course, in the one case the chance of saving the order only if one remedy rather than another is chosen, while in the other the order would survive whichever was chosen. But in each we would be giving needless constitutional dissertations on some points. That is nonetheless true in a case where the constitutional questions seem to a majority of us simple, uncomplicated and of no great dignity. For the single constitutional question necessary for decision will not be isolated until the precise pinch of the order on the appellant is known. It will not be known in the present case at least until appellant elects or is required (1) to shut down, (2) to become a carrier of the Peerless gas, or (3) to purchase it.

The legal, as well as the economic, relationship which Republic will bear to Peerless will vary as one or another choice is made. To make Republic a "carrier" is to submit it to different business risks than to make it a "purchaser." The fact that each would raise only questions of "due process" under the Fourteenth Amendment does not mean that the questions are identical. Even when reasonableness is the test, judges have developed great contrariety of opinions. The point is that today the variables are presented only in the abstract. Tomorrow the facts will be known, when the precise impact of the order on appellant will be determined. Thus to me the

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policy against premature constitutional adjudication precludes us from saying the judgment in the present case is "final."

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE BURTON join, dissenting.

I think the Oklahoma Supreme Court's judgment is final for the purposes of § 237 of the Judicial Code, 28 U. S. C. § 344, that the state commission's order is valid, and that deferring decision on the merits to some indefinite future time will only prolong an already lengthy litigation unnecessarily and with possible irreparable harm to one party or the other.

Appellant, Republic Natural Gas Company, has operated gas wells in the Hugoton Gas Field for many years. It was the first major producer to exploit the Oklahoma portion of the field,[1] having constructed its own gathering system and pipe lines extending from Oklahoma into Kansas. With only minor exceptions Republic has never carried any but its own gas in its pipe lines.[2] 198 Okla. at 352.

In 1944 appellee, Peerless Company, completed its only well in Oklahoma, in the Hugoton field. This well is not connected to any pipe line. It therefore presently lies dormant. Surrounding Republic wells drilled into the same reservoir concededly are draining gas constantly from under the Peerless land.[3] Except for the part of

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[1] Republic has 92 wells in Kansas and 38 in Oklahoma.

[2] The Oklahoma Supreme Court found it unnecessary to consider whether Republic was either a common carrier or a common purchaser of gas. 198 Okla. at 353. The term "common purchaser" is explained in Okla. Stat., tit. 52, § 240.

[3] Appellant concedes that the "operation of the Republic wells is draining gas from under the dormant Peerless well." The findings of the commission state: "(d) Republic . . . is taking and will continue to take more than its proportionate part of the natural

Republic's gathering system which runs across the Peerless land, no market outlet that would take sufficient gas to justify production of the Peerless well is close enough to make it financially practical for Peerless to construct its own pipe line. It is undisputed that the only feasible method of producing the well is to require Republic to take Peerless gas into its gathering system.[4]

For this reason Peerless applied to the Oklahoma Corporate Commission for an order compelling Republic to connect its pipe line to the Peerless well and to purchase gas from Peerless at a price to be fixed by the commission. After hearing, the commission concluded that the applicable Oklahoma statutes [5] required it to enforce ratable taking and ratable production of gas as between Republic and Peerless.

The commission recognized alternative methods of protecting Peerless from loss due to drainage, first by ordering

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gas in said field unless required to take ratably from said well of Peerless . . . .

"(e) Republic . . . is draining gas from underneath said Section 14 into which said Peerless Oil and Gas Company's well has been drilled, and will continue to drain gas from underneath said Section 14 until all the gas thereunder has been drained and Peerless . . . will be prevented from taking its proportionate share of the natural gas in the field unless Republic . . . is required to take gas ratably from [Peerless]."

[4] The Report of the commission states: "It is evident from all the facts and circumstances in this case that if the Peerless Company is to be allowed to produce gas from its well, this gas must be by it transported fifteen to thirty miles, unless said gas is transported or disposed of by the Republic Natural Gas Company.

"It would be impractical from a financial standpoint to construct a pipeline to any city or other market outlet that would take sufficient gas to justify the production of this well; and it would be impossible to economically operate the well under present conditions existing in that field unless the gas is taken into the pipeline of the Republic Natural Gas Company."

[5] Okla. Stat., tit. 52, §§ 232, 233, 239, 240, 243.

all wells in the area to shut down completely, and second by ordering Republic to purchase from Peerless. Since the first method was considered harsh, the second was preferred. Accordingly the commission issued an order requiring Republic to take gas ratably from the Peerless well as soon as the necessary connection could be made, allowing it, however, the alternative of closing down all of its wells in the Oklahoma portion of the field if it preferred this to taking the Peerless gas. The terms and conditions of the taking were to be determined by the parties; but, in the event of failure to agree, they were "granted the right to make further application to the Commission for an order fixing such terms and conditions . . . ."[6] The taking, however, was not to await this agreement or further order; it was to begin at once.[7]

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[6] The order required Republic "1. . . . *to take gas ratably* from [Peerless] *and to make necessary connection as soon as applicant lays a line connecting* said well with respondent's line, and to continue to do so until the further order of this Commission; provided that, applicant shall lay its line from its well to the lines of respondent at some point designated by the respondent, but in said Section 14 in which said well of Peerless . . . has been drilled; *and said respondent is required to make said designation immediately and without* unreasonable delay, and in event of failure of respondent so to do, respondent shall no longer be permitted to produce any of its wells located in the Hugoton Oklahoma Gas Field. [Emphasis added.]

"2. The terms and conditions of such taking of natural gas by [Republic] from [Peerless] shall be determined and agreed upon by and between applicant and respondent; and in the event said parties are unable to agree, applicant and respondent are hereby granted the right to make further application to the Commission for an order fixing such terms and conditions; and the Commission retains jurisdiction hereof for said purpose."

[7] See note 6. The order's language leaves no room for the inference, which appears to be injected here, that the taking was not required to begin until the terms had been agreed upon or determined by further order.

Affirming the order, the Supreme Court of Oklahoma construed the state statutes to authorize the administrative action. 198 Okla. 350. The case thus presents on the merits the question whether a state, as a means of adjusting private correlative rights in a common reservoir, has the power in such circumstances as these to compel one private producer to share his market with another, when otherwise his production would drain off that other's ratable share of the gas in place and thus appropriate it to himself.

I.

The majority consider that the proceedings in the state tribunals have not terminated in a final judgment from which appeal to this Court lies, and therefore refuse to adjudicate this question.

In the strictest sense the state proceedings will not be completed until the parties have agreed upon the terms and conditions of Republic's taking of gas from Peerless or, if they do not agree, until the commission has issued an additional order fixing those terms. Since it is not certain that the parties will agree, the possibility remains that a further order may be required before all phases of the controversy are disposed of. It is this possibility, as I think a remote one, which furnishes one of the grounds for concluding that the Oklahoma court's judgment is not final within the meaning and policy of § 237.

The fact that all phases of the litigation are not concluded does not necessarily defeat our jurisdiction. This is true, although as recently as *Gospel Army* v. *Los Angeles*, 331 U. S. 543, we reiterated that, for a judgment to be final and reviewable under § 237, "it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the

appellate court . . . directed.'" 331 U. S. at 546. This is the general rule, grounded in a variety of considerations reflected in the statutory command [8] and coming down to the sum that, in exercising the jurisdiction conferred by § 237, this Court is not to be concerned with reviewing inconclusive, piecemeal, or repetitious determinations. The *Gospel Army* case represents a typical instance for applying the terms and the policy of § 237.[9] But not every decision by a state court of last resort leaving the controversy open to further proceedings and orders is either inconclusive of the issues or premature for purposes of review under § 237. This appears most recently from the decision in *Radio Station WOW* v. *Johnson,* 326 U. S. 120, which applied a settled line of authorities to that effect. Cf. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69.

In such cases the formulation of the test of finality made in the *Gospel Army* and like decisions has not been followed. Instead that question, in the special circumstances, has been treated as posing essentially a practical problem, not one to be determined either by the label attached to the state court judgment by local law, *Richfield Oil Corp.* v. *State Board, supra,* or by the merely mechanical inquiry whether some further order or proceeding beyond "the ministerial act of entering the judgment" may be had or necessary after our decision is rendered. *Radio Station WOW* v. *Johnson, supra* at 125.

The *WOW* opinion noted that the typical case for applying the broader, less mechanical approach to the

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[8] Some of the considerations are enumerated in *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–124.

[9] Under California procedure the state supreme court's unqualified order for reversal was "effective to remand the case 'for a new trial and [place] the parties in the same position as if the case had never been tried.'" 331 U. S. at 546 and authorities cited. The effect was thus to leave all issues inconclusively determined pending further proceedings in the trial court.

question of finality had involved judgments directing the immediate delivery of property, to be followed by an accounting decreed in the same order. It stated, with reference to these and like situations: "In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." 326 U. S. at 126. Accordingly, since the two phases of the controversy were separate and distinct, we exercised our jurisdiction to determine the federal questions involved in the phase concluded by the state court's decision. This was done, although the judgment required further and possibly extensive judicial proceedings before the other and separable phase of the accounting could reach a final determination.[10] Those further proceedings involved very much more than "ministerial acts"; indeed the determination of a complicated accounting requires the highest order of judicial discretion.

Notwithstanding this and despite the want of strict finality, jurisdiction was sustained because a number of factors were felt to require that action in order to give effect to the policy of § 237 providing for review, rather than to a merely mechanical application of its terms for denying review.

There was nothing tentative or inconclusive about the Nebraska court's judgment for immediate delivery of the property. Nor was it necessary to execution of that phase of the judgment to have contemporaneous conclu-

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[10] The two prior decisions deemed decisive against mechanical determination of finality in such situations were *Forgay* v. *Conrad*, 6 How. 201, and *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, the former of which we noted had "stood on our books for nearly a hundred years in an opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney." 326 U. S. 120, 125.

sion of the accounting phase. Except for the latter, the judgment was ripe for review. Indeed immediate execution without review of the federal questions affecting the delivery phase until after the accounting had been completed, offered the possibility of irreparable harm to one or possibly both of the parties. This factor obviously tended to make later full review partly or wholly futile. Moreover, until the delivery phase had been settled, it could not be known whether the accounting would be necessary, for that need was consequentially incident to and dependent upon determination of the core of the litigation, which was the right to delivery.

In these circumstances it was rightly considered more consistent with the intent and purpose of § 237 to allow immediate review, notwithstanding the possibility of a later further review in the accounting phase, than to deny review with the chance that a later one might not fully save the parties' rights. The section's policy to furnish full, adequate and prompt review outweighed any design to secure absolute and literal "finality."

In all these respects this case presents a parallel to the *WOW* case too close, in my opinion, for distinguishing between them. Republic is not directed to negotiate terms and on completing the negotiation to make its facilities available to Peerless. It is ordered to make a connection with Peerless and to begin carrying gas at once. That phase of the order, like the delivery phase in the accounting cases, does not await the fixing of the terms whether by agreement or by further order.[11] It is a present obligation, effective immediately and without qualification.[12] See *Knox Loan Assn.* v. *Phillips,* 300 U. S. 194, 198.

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[11] See notes 6, 7 *supra* and text.

[12] In the remote event that Republic should elect to shut down production, there would be no need for a further order or agreement of the parties, and the presently erected obstacle to finality would be completely removed.

Moreover there is nothing tentative or inconclusive about this phase of the order or the state judgment sustaining it. That phase not only is separable from the matter of fixing the terms; like the order for delivery in the *WOW* case, it is the main core of the controversy to which the aspect of fixing terms is both consequential and incidental. The *WOW* order required immediate delivery of property, with consequent possibility of irreparable harm. Here the order required immediate acceptance of delivery, with similar possibility of injury for one party or the other.[13]

Neither is there greater likelihood of piecemeal consideration of constitutional and other questions than in the *WOW* case. Cf. 326 U. S. at 127. The matter of fixing terms here hardly can be more difficult practically or more complex legally than making the accounting in the *WOW* case.[14] It is hard also to see how one would be either more or less likely to throw up new constitutional issues than

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[13] To permit Republic to continue drainage from beneath Peerless' land for the indefinite period required for sending the case back to the Oklahoma tribunals and then bringing it back here a second time will be to deprive Peerless of that gas unless the state law allows compensation for such continued taking from the date of the present order. It is at least highly doubtful that the state law allows such a remedy, even if the order is eventually held valid.

On the other hand, if the order should be invalidated on the deferred review, Republic will have been put to further and unnecessary delay, uncertainty and expense in ascertaining its rights, merely to secure a determination which cannot possibly affect them. If this may not be irreparable injury, it certainly is not the policy of § 237.

[14] In view of marketing conditions in this industry, no such problem of valuation or of reaching agreement upon it would be presented as, for instance, in the case of seeking to place a value upon real estate taken by condemnation for public use or valuation of property for rate-making purposes. The idea that determining the value of the gas taken here would present all the difficulties of valuing a railroad for rate-making purposes blows the matter up beyond all the practicalities of the situation.

the other. Nor can the *WOW* case be taken to rule that this Court could not or would not consider constitutional issues arising on the accounting phase, unlikely though the necessity for its doing so may have been. There is thus a substantially complete parallel between the situation now presented and that in the *WOW* line of cases.

In one respect this case is stronger for finding appealable finality. For here no further order may be necessary or made, since present resolution of the basic constitutional problem in all probability will end the entire controversy. That certainly would be the result if the decision should go against Peerless or if Republic should elect to shut down production. And if the decision should be in Peerless' favor, it is hardly likely that the parties will be unable to agree upon terms since, in case of failure to agree, the commission will prescribe them.[15] The case indeed is not basically a controversy over terms at all. They present only a contingent, collateral matter. What is fundamentally at stake is the right of Republic to take the gas from beneath Peerless' land and market it without paying Peerless for it. Once that question is finally determined, as it can be only by this Court's decision of the constitutional question, the need for a further order will become highly improbable.

This case therefore is one in which the need for further proceedings may never arise and almost certainly would not do so if the constitutional question were now determined. Indeed, in a closer factual application than the *WOW* case, it presents in the jurisdictional aspect an almost exact parallel to the order reviewed in *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, where the Oklahoma commission required the appellant to carry oil for the appellee at unspecified rates. Cf. *Gulf Refining*

[15] See note 14.

Co. v. *United States,* 269 U. S. 125; *Clark* v. *Williard,* 292 U. S. 112.

The parallel to the *WOW* line of decisions, however, is put aside and this case is decided by analogy to condemnation cases, particularly *Grays Harbor Logging Co.* v. *Coats-Fordney Co.,* 243 U. S. 251. The analogy is inapposite. It is true that in such cases this Court generally, though not uniformly,[16] has held that the trial court judgment is not final until after the award of compensation is made. The decisions were properly rendered, but for reasons not applicable here. In the *Grays Harbor* case the state constitution and controlling legislation prohibited the transfer of the condemned property until after the compensation had been determined and paid. Thus the issue of the right to take was necessarily dependent for final resolution on the determination of the amount of compensation.[17] The controversy was not separable into distinct phases as in the *WOW* case and here. 243 U. S. at 256.[18] Nor had the state judgment already affected the appellant's property rights, as was true in the *WOW* case and is true here.

In *Catlin* v. *United States,* 324 U. S. 229, the question of the right to take was settled conclusively below before the award of damages was fixed. But there to have permitted an appeal from the order transferring possession would have produced delays inconsistent with the over-

[16] *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.,* 138 U. S. 287.

[17] The same was said to be true of *Luxton* v. *North River Bridge Co.,* 147 U. S. 337. See *id.* 341.

[18] Moreover, under state practice review of the condemnation order by the state supreme court was by certiorari, not by appeal which lay only from the order fixing damages. As a matter of state law, therefore, the judgment on the condemnation order was interlocutory. See, however, as to this *Catlin* v. *United States,* 324 U. S. 229, 234; *Luxton* v. *North River Bridge Co.,* 147 U. S. 337.

riding purpose and policy of the War Purposes and Declaration of Taking Acts. 26 Stat. 316, as amended by 40 Stat. 241, 518; 46 Stat. 1421. 324 U. S. at 235, 238, 240. Here the converse is true, for to refuse to pass on the merits can serve only to prolong the litigation without compensating advantage for the policy of § 237 or other enactment. There is no overriding policy of independent legislation, comparable to that of the War Purposes and Declaration of Taking Acts, dictating denial or deferring of review.

The asserted analogy to the *Grays Harbor, Catlin* and *Luxton* (see note 17) cases therefore does not hold for the entirely different situations now presented. In them either there was no separable phase of the litigation; or statutory policy independent of § 237 or other like requirement of finality forbade review before ultimate disposition of every phase of the litigation in the state or inferior federal courts. The condemnation cases therefore, though generally uniform in denying review of orders for condemnation prior to award of damages, are not uniform in resting this result wholly on the requirement of "finality" made by § 237 and like provisions for review, but frequently rest on other and independent grounds pertinent to the application of those provisions.

The "penumbral area" of appealable finality, see 326 U. S. at 124, may not be sweeping in its scope. It is nevertheless one essential to prevent the letter of the section from overriding its reason. For this purpose it would seem to comprehend any situation presenting separable phases of litigation, one involving the core or crux of the controversy between the parties, the other collateral matters dependent for the necessity of their consideration and decision upon final and unqualified disposition of the hub of the dispute. If a merely mechanical application of § 237 is to be avoided, it cannot be taken that the practical approach of the *WOW* line of decisions must

be limited exclusively to cases where an accounting is ordered to follow delivery of property decreed at the same time. The reason of the exception, indeed of § 237 itself, is not so limited. Because the delivery and accounting cases are not the only ones presenting such problems, judgment must be given some play in other situations as well to decide whether the vices excluded by the policies underlying § 237 are present, as they may be or not according to the character and effects of the particular determination sought to be reviewed.

Finally, it hardly can be that merely the alternative character of the order *per se* deprives it of finality, regardless of whether any of the alternatives presents a substantial federal question. Because Republic is allowed to choose between shutting down its wells and carrying or purchasing the Peerless gas, it seems to be thought that the order lacks finality until that choice is made, even though when made either course would be clearly within the state's power to require.

The argument would have more force if the difference between the alternatives were great enough to make it likely that contrary results might be reached on the different alternatives. But where as here the difference emphasized, *e. g.*, is merely between the passage of title before and after the carriage, it is hard to see how there could be more difficulty with one alternative than with the other. See Part II; also Part IV. So minor a distinction hardly furnishes a substantial basis for contrariety of judicial opinion on due process questions. Nor is it suggested that allowing the choice between either of those two courses and shutting down presents greater difficulty. Given constitutionality of all alternatives, it no more transcends state power to permit the party affected to select the course least onerous than to require him to follow the one most burdensome. It is equally hard to see how giving the choice destroys the order's

finality, unless again a wholly mechanical conception of that term as used in § 237 is to control.

The section's policy is against hypothetical, premature and piecemeal constitutional decision, not against a choice of alternatives presenting no such problem. Here the question is whether Oklahoma can offer Republic the choice of shutting down production or taking and paying for the Peerless gas. Either course will protect the latter's rights against drainage by Republic. Either standing alone in the order's terms would not affect finality. Neither, merely upon the premise that alternative character *per se* destroys finality, presents a doubtful question of constitutionality. And finally the alternative of shutting down, realistically considered, is more nearly sanction than alternative mode of compliance.[19]

In such circumstances to say that coupling the two courses alternatively deprives the order of finality seems to me to be giving to the terms of § 237 a mechanical application out of harmony with the section's policy, just as does refusing to decide the case before it is known whether a further order may be necessary for fixing the price of the Peerless gas. Such a view can only handicap administrative action either by forcing orders to specify a single course of compliance when alternatives may be much more desirable, or by delaying review and thus

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[19] Cf. *Wabash and Erie Canal* v. *Beers*, 1 Black 54; *Milwaukee and Minnesota R. Co.* v. *Soutter*, 2 Wall. 440.

Control of production, of course, is the core of state conservation programs. In *Champlin Rfg. Co.* v. *Comm'n*, 286 U. S. 210, proration orders limiting production of oil wells to as little as six per cent of capacity were sustained. See p. 229. Cf. *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61. The power of a state to protect correlative rights hardly can be regarded as furnishing a less solid basis for control of production than the power to prevent waste. See note 29 and text *infra*.

effective administrative action until one or perhaps all of the alternatives in turn are tried out first in election and then in review. A decision now would settle every substantial pending phase of the controversy. At the most but a minor consequential and separable aspect would remain for remotely possible further action in the state tribunals. It is to the interest of both parties, and the state authorities as well, that their rights be determined and the controversy be ended. And on the facts the question of jurisdiction is closely related to the merits.

In view of all these considerations, to deny the parties our judgment now is to make a fetish of technical finality without securing any of the substantial advantages for constitutional adjudication which § 237, in the light of its underlying policies, was designed to attain. Instead that section becomes an instrument of sheer delay for the performance of our function, for executing those of state agencies, and for settling parties' rights. The section has no such office. By declaring now that the state may follow either of two clearly permissible courses and allow those with whom it deals to choose between them, we would not speak hypothetically or prematurely or violate any other policy underlying § 237.

II.

Beyond the matter of jurisdiction, there is in this case no such question concerning its exercise as arose in *Rescue Army* v. *Municipal Court,* 331 U. S. 549. The constitutional issues are not speculative, premature or presented abstractly *en masse.* The "alternative character" of the state judgment does not prevent the federal questions from being sufficiently precise and concrete for purposes of decision here, although various ambiguities have been suggested.

Thus it is said that we cannot tell whether the order compels Republic to share its market or merely requires it to carry gas to a market which Peerless must obtain for itself. Cf. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55. The order here is not subject to such an ambiguity. It in terms commands Republic to take Peerless gas and to pay for it.[20]

It is also suggested that we cannot tell whether Republic will have to purchase gas from Peerless or just transport the gas to market and account for the profits. But whether legal title passes at one end of the Republic line or at the other is, as we have noted, wholly immaterial as a matter of constitutional law. Cf. *The Pipe Line Cases*, 234 U. S. 548. In either event under the order and judgment Republic must take Peerless gas into its system, must pay for it and, unless its market should expand suddenly far beyond present expectations, must therefore share its market with Peerless.

It is said further that we cannot be sure whether the commission intends to make Republic act as a common carrier. The only basis for this doubt is the fact that the commission's findings state that Republic is a common carrier and common purchaser. But the state supreme court upheld the order on the assumption that those findings were incorrect. The justification for re-

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[20] In its report the commission concluded that Republic should be required to ". . . allow the Peerless gas to enter the Republic pipeline, and pay the Peerless Company for the gas." The order itself in unqualified terms directs Republic "to take gas ratably from [Peerless] . . . as soon as applicant lays a line connecting said well with respondent's line . . . ." See notes 6, 7.

Since neither the commission's report nor the state supreme court's opinion suggests that the command was qualified by the condition that Peerless obtain its own market, we need not read such a condition into the order. The commission report states that "Republic offers to transport the Peerless gas if market can be obtained by [Peerless] . . . ."

quiring Republic to carry Peerless gas is based primarily on the fact of drainage caused by Republic's production.

III.

It has been noted previously that the question on the merits is not unrelated to the issue of finality. To it, accordingly, attention is now directed. The real fight, as has been stated, is over the right of Republic to drain away the Peerless gas without paying for it. The question as cast in legal terms is whether the due process and equal protection clauses of the Fourteenth Amendment deny Oklahoma the power to give one private producer from a common pool the option to shut down production altogether or to purchase gas from another for the purpose of adjusting their correlative rights in the pool, when that is the only practical or feasible alternative consistent with production by both to protect the latter from drainage by the former.

Republic denies the state's power to do this. Its basic position is that it has a federal constitutional right to drain off all the gas in the field, unless other owners of producing rights can supply their own facilities for marketing their production, regardless of varying conditions in different competitive situations and regardless of all consequent practical considerations affecting feasibility of furnishing such facilities.

Republic has no such right. The Constitution did not impress upon the states in a rigid mold either the common-law feudal system of land tenures or any of the modified and variant forms of tenure prevailing in the states in 1789. Rather it left them free to devise and establish their own systems of property law adapted to their varying local conditions and to the peculiar needs and desires of their inhabitants. The original constitution placed no explicit limitation upon the powers of the states in

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this respect.[21] Not until the Fourteenth Amendment was ratified, nearly eight decades later, was one introduced.

The Fourteenth Amendment was not designed to nullify state power to create institutions of property in accord with local needs and policies. Whether or not it was intended to secure substantive individual rights as well as procedural ones,[22] it was not a strait jacket immobilizing state power to change or alter institutions of property in the public interest.[23] Almost innumerable decisions have demonstrated this, even though the Amendment has been effective to create substantial limitations upon the methods by which the changes deemed necessary may be made.

The basic question here is really one of substantive due process. It relates primarily to whether Oklahoma can curtail the unqualified right of capture which appellant conceives it acquired by virtue of and as an unalterable incident to its acquisition of surface rights including the right to drill for gas. For, in denying that the state

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[21] The nearest approximations perhaps were in the prohibitions against state legislation impairing the obligation of contracts and against *ex post facto* legislation before the latter was limited to criminal and penal consequences. *Calder* v. *Bull*, 3 Dall. 386. See Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 621, 852.

[22] See MR. JUSTICE BLACK dissenting in *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 423; Boudin, Truth and Fiction about the Fourteenth Amendment, 16 N. Y. U. L. Q. Rev. 19.

[23] It is precisely in cases where the Amendment has been made thus effective, often by giving expansive scope to the idea of "property," that its interpretations have failed to withstand the test of time. Compare *Ribnik* v. *McBride*, 277 U. S. 350, with *Olsen* v. *Nebraska*, 313 U. S. 236; *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, with *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187; *Lochner* v. *New York*, 198 U. S. 45, and *Adkins* v. *Children's Hospital*, 261 U. S. 525, with *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

can enforce the only feasible method of limitation consistent with production by Peerless, Republic in effect is saying that the state cannot restrict its right to take all gas in the common reservoir, including all that can be drained from beneath Peerless' lease and the lands of other owners similarly situated. This is, for the particular circumstances, a denial of the state's power to protect correlative rights in the field or to regulate appellant's taking in the interest of others having equal rights proportionate to their surface holdings. For, though Republic concedes it is bound by Oklahoma's statutory requirement of *pro rata* production, that requirement becomes merely a time factor affecting the rate and length of the period of Republic's drainage, not the total quantity eventually to be taken, if Republic can defy the commission's order and thus leave Peerless in its present helpless condition.

The contention is bold and far reaching, more especially when account is taken of the nature of the industry. Natural gas in place is volatile and fugitive, once a single outlet is opened. When extracted it cannot be stored in quantity, but must be marketed ultimately at burner tips in the time necessary for conveyance to them from the well mouth. The competitive struggle for the industry's rewards is particularly intense in the initial stage of developing a field. By the industry's very nature large outlays of capital are required for successful continuing production and marketing. All those factors however tend toward monopoly once success has been achieved in a particular field.

These peculiar qualities, moreover, have been reflected in the legal rights relating to the ownership of gas in place, as well as its extraction. They have been adapted to its nature and to that of the competitive struggle regarding it. Only a specialist in this branch of the law, which varies from state to state, can undertake to say

with any reliable degree of precision what rights may be in particular situations. These difficulties, intensified by the competitive struggle for the product and the inadequacy of common-law ideas to control it, have forced both the states and the federal government to adopt extensive regulatory measures in recent years. This has been necessary both to conserve the public interest in this rapidly depleting natural resource [24] and to secure fair adjustment of private rights in the industry. Rather than being a sacred, untouchable enclave of the common law, the field by its very nature lends itself especially to governmental intervention for such purposes. In this respect it is hardly comparable to situations comprehending only conventional manufacturers and merchants of consumable goods.

In accordance with Oklahoma's law, appellant does not assert title to the gas in place. It asserts only the right to capture what it can produce. But that right, unqualified, would include the right to take gas from beneath others' lands. So taken, it defies their rights to a proportionate share and the state's power to secure them, if for reasons rendering marketing through their own facilities unfeasible they cannot join in the unrestrained competitive draining.

So far as the federal Constitution is concerned, there is no such unrestricted fee simple in the right to drain gas from beneath an adjacent owner's land. It is far too late, if it ever was otherwise, to urge that the states are impotent to restrict this unfettered race or to put it upon terms of proportionate equality by whatever measures may be reasonably necessary to that end. Indeed our constitutional history is replete with instances where the states have altered and restricted schemes of property

[24] Cf. *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, dissenting opinion of MR. JUSTICE JACKSON at 628.

rights in response to the public interest and the states' local needs. In some cases this has gone to the extent of abolishing basic common-law conceptions entirely and substituting new ones indigenous to their areas and the problems they present. Perhaps the most extensive and obvious illustrations are to be found in the systems developed in our arid and mountainous western states for governing rights in the waters of flowing streams and mining rights in respect to precious metals.[25] Others are not lacking.[26]

It hardly can be maintained that the creation and control of rights respecting the ownership, extraction and marketing of natural gas are less broadly subject to state control than those relating to waters for irrigation and other uses or to the extraction of precious metals in the regions where those matters have called into play the states' authority to act in the manner best suited to local conditions and the needs of their inhabitants. The similarities of the situations and the problems, for purposes of constitutionality in the exercise of those powers, are so obvious they do not need to be specified.

Historically, the states' freedom to exercise broad powers in defining and regulating rights of ownership and production of natural gas has been recognized almost as long and quite as completely as their similar freedoms to act in relation to water rights and mining rights. In

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[25] See *Clark* v. *Nash,* 198 U. S. 361; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Kansas* v. *Colorado,* 206 U. S. 46, 93–94; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 702–703; *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527; *Parley's Park Silver Mining Co.* v. *Kerr,* 130 U. S. 256; *Butte City Water Co.* v. *Baker,* 196 U. S. 119; *Kendall* v. *San Juan Silver Mining Co.,* 144 U. S. 658; *Clason* v. *Matko,* 223 U. S. 646.

[26] *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *Wurts* v. *Hoagland,* 114 U. S. 606; *Bacon* v. *Walker,* 204 U. S. 311; cf. *Ferry* v. *Spokane, P. & S. R. Co.,* 258 U. S. 314; *Campbell* v. *California,* 200 U. S. 87.

a line of cases beginning a half century ago with *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, this Court has upheld various types of state regulatory schemes designed to prevent waste and to protect the "coequal rights" of the several owners of a common source of supply.[27] These cases clearly recognize that the state regulation may be justified on alternative grounds, either to prevent waste or to adjust private correlative rights.[28]

It is true, as appellant points out, that none of those cases presented the specific issue of whether the state may adjust correlative rights independently of a conservation program. But it is not true that this power is merely incidental to the fundamental right of the state to preserve its natural resources. In fact, if one power were incidental to the other, the *Ohio Oil* case would support the view that waste prevention is justifiable because it serves "the purpose of protecting all the collective owners . . . ." 177 U. S. at 210.[29] Moreover, it is significant that the opinion in *Bandini Petroleum Co.* v. *Superior Court* specifically states that the California reg-

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[27] *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210; *Hunter Co.* v. *McHugh,* 320 U. S. 222.

[28] See Hardwicke, The Rule of Capture, 13 Tex. L. Rev. 391, 414–422; Marshall and Meyers, Legal Planning of Petroleum Production, 41 Yale L. J. 33, 48–52; Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1222–1225; Ford, Controlling the Production of Oil, 30 Mich. L. Rev. 1170, 1181, 1192.

[29] Independently of any statute, several states have granted equitable relief against waste in order to protect the correlative rights of common owners of a reservoir of gas or oil. *Louisville Gas Co.* v. *Kentucky Heating Co.,* 117 Ky. 71; *Manufacturers Gas and Oil Co.* v. *Indiana Natural Gas and Oil Co.,* 155 Ind. 461, 474–475; *Ross* v. *Damm,* 278 Mich. 388; *Higgins Oil & Fuel Co.* v. *Guaranty Oil Co.,* 145 La. 233; *Atkinson* v. *Virginia Oil & Gas Co.,* 72 W. Va. 707.

ulation is valid on its face, even if viewed as a measure designed purely for the protection of correlative rights. 284 U. S. 8, 22.[30]

Oklahoma's power to regulate correlative rights in the Hugoton field therefore does not stem from her interest merely in the preservation of natural resources. It stems rather from the basic aim and authority of any government which seeks to protect the rights of its citizens and to secure a just accommodation of them when they clash.[31] That authority is constantly exercised in our system in relation to other types of property.[32] In view of this

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[30] The Supreme Court of Texas has recently upheld administrative action designed solely to protect correlative rights. *Corzelius* v. *Harrell,* 143 Tex. 509. Note, 24 Tex. L. Rev. 97.

[31] Oklahoma can prevent agents of Republic from going on Peerless' land by force of arms and there drilling a well and stealing gas. The state's power to prevent larceny and trespass and to enjoin any use of property that creates a nuisance for a neighboring property owner also justifies the regulation of common property for the mutual advantage of its several owners. *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *Bacon* v. *Walker,* 204 U. S. 311.

Under certain circumstances a state may compel one individual to surrender private property solely to enable another to exploit the potential resources of his private property. Thus in *Clark* v. *Nash,* 198 U. S. 361, the plaintiff's land could be made productive only by enlarging an irrigation ditch across defendant's land, and in *Strickley* v. *Highland Boy Gold Mining Company,* 200 U. S. 527, the mining company could deliver its ore to market only by constructing an aerial bucket line across defendant's land. Here Peerless can exploit its property only if Republic is compelled to take its gas to market. Moreover, until Peerless is able to produce the gas under its land, this gas will continue to be withdrawn by Republic. In effect Republic is now exploiting Peerless' property.

[32] *E. g., Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *Wurts* v. *Hoagland,* 114 U. S. 606; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Bacon* v. *Walker,* 204 U. S. 311; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531; *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22.

fact and of what has been said concerning conditions in this industry, it would be incongruous for us to hold that oil and gas law is the one phase of property law that cannot be modified except for conservation purposes. Especially in the light of its origin and development in a *laissez faire* atmosphere appropriate for fostering intense competitive expansions, see Merrill, The Evolution of Oil and Gas Law, 13 Miss. L. J. 281, the states should be allowed certainly not less freedom to evolve new property rules to keep pace with changing industrial conditions than they possess in nearly every other branch of the law.[33] Here as elsewhere, in considering the proper scope for state experimentation, it is important that we indulge every reasonable presumption in favor of the states' action. They should be free to improve their regulatory techniques as scientific knowledge advances, for here too experimentation is the lifeblood of progress. See Mr. Justice Brandeis dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280.

IV.

The remaining narrow issue is whether the most practical method of achieving a fair accommodation of the

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[33] "It is submitted that through the judicial and legislative processes correlative right-duty relations against injury and non-compensated and preventable drainage do exist, but the difficulty of finding and proving the facts in a particular situation is such that the usual remedies of damages and injunction might not be practicable. It seems more advisable that legislatures enact statutes expressly declaring the existence of these correlative right-duty relations in landowners, apart from public rights against waste, and authorize an administrative agency, after a finding of facts, to promulgate rules and regulations for their protection and authorize the Commission or private owners to enforce such rules and regulations through actions in the courts." Summers, Legal Rights against Drainage of Oil and Gas, 18 Tex. L. Rev. 27, 47.

correlative rights of the parties is invalid because Republic is required to take and to pay for gas that it does not want—at least does not want if it must pay for it.

Appellant relies heavily on *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, where this Court invalidated an order limiting respondent's production so severely that it would have had to purchase gas from unconnected wells in its vicinity in order to satisfy its commitments. Thus the necessary effect of that order was comparable to the effect of the order under review here.

But there is a crucial difference between the cases. In deciding the *Thompson* case the Court explicitly assumed that the order could be upheld if reasonably designed either to prevent waste or "to prevent undue drainage of gas from the reserves of well owners lacking pipe line connections." [34] Because of a geological anomaly there was a general drainage in the gas field away from the connected wells toward the unconnected wells, 300 U. S. at 71–73, so that the producing wells, rather than draining gas away from the dormant wells, would only reduce their own loss by producing as much as possible. Therefore the limitation on their production could not be justified, since it was neither for the purpose of preventing waste nor a reasonable regulation of correlative rights. Instead of protecting one party from loss, it operated to aggravate the effect of the drainage away from the owners of connected wells. They suffered, not only by an increased drainage loss, but also by the consequence that they were forced to share their facilities and market with the very parties who profited by their loss. The Court held that such an order requiring one company to share its market with another was unconstitutional inasmuch

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[34] 300 U. S. at 76–77. This assumption is repeated several times in the opinion. See 300 U. S. at 58, 67, 69 and 72–73.

as it was not justified either as a conservation measure or as a reasonable adjustment of correlative rights. The latter justification is present in this case.

The fact that Republic is compelled either to purchase Peerless' gas or to carry it to market and account for the profits does not make the regulation unreasonable. If that were the sole cause for complaint, the state could take the more drastic step of requiring all the well owners to shut down completely until all were able to produce on a ratable basis or came to some agreement effective to make this possible. It is clearly within the state's power to require Republic to compensate Peerless for the gas drained from under the Peerless land. *Patterson* v. *Stanolind Co.*, 305 U. S. 376. Here, instead of requiring Republic to make a cash payment based on the estimated amount of drainage, the commission has selected what is unquestionably a more accurate method of adjusting the correlative rights. Even if it could be assumed that this method imposed a somewhat heavier burden on Republic than possible alternatives, it does not follow that the method selected by the commission is unconstitutional. For we have constantly recognized the propriety of allowing wide discretion to the administrative agencies who are best qualified to select the most reasonable solutions to the thorny problems that accompany regulation in this highly technical field. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573. Keeping in mind the fact that property law is peculiarly a matter of local concern, the special difficulty of defining and regulating property rights in natural gas, the respect due to experts in this field, and the rather unusual facts this record presents, I cannot say that the state is without power to enter this order.

It is suggested that the order, since it includes the requirement of purchase and not merely of transportation

and accounting for profits, becomes invalid because it shifts from Peerless to Republic the business risk incident to ownership and sale of the gas. Possibly this might furnish a more serious basis for objection in materially different circumstances. But, apart from what has already been said, in those now presented I conceive no substantially greater harm to be possible, from the order's operation, than depriving Republic of the right to drain gas from beneath Peerless' lease without liability to pay for the gas so drained.

This assumes that if the parties should be unable to agree upon terms the commission will fix them in a manner taking due account of prevailing market conditions relevant to the price to be paid, as well as reasonable compensation for the use of Republic's facilities. With those limitations properly applied, it is hard to see what great business risk will be shifted to Republic. For, as we have already noted, the commodity is one not subject to storage, must be sold as soon as it is transported to the point of consumption, and therefore cannot be subject to possible wide fluctuation in selling price between the times of purchase and sale by Republic.

The facts here, it seems to me, justify the commission's action. Whether others materially different may do so should be left to be considered when they arise.

I would affirm the judgment of the Supreme Court of Oklahoma.

UNITED STATES *v.* GRIFFITH ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 64. Argued December 15, 1947.—Decided May 3, 1948.

1. Even in the absence of a specific intent to restrain or monopolize trade, it is violative of §§ 1 and 2 of the Sherman Act for four affiliated corporations operating motion picture theatres in numerous towns in three states and having no competitors in some of these towns to use the buying power of the entire circuit to obtain exclusive privileges from film distributors which prevent competitors from obtaining enough first- or second-run films to operate successfully. Pp. 101–110.

   (a) It is not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that §§ 1 and 2 of the Sherman Act have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of the defendants' conduct or business arrangements. P. 105.

   (b) Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results prohibited by the Sherman Act. P. 105.

   (c) The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. Pp. 106–107.

   (d) It is unlawful for the operator of a circuit of motion picture theatres to use his monopoly in towns in which he has no competitors to obtain exclusive rights to films for towns in which he has competitors. Pp. 107–109.

   (e) The exhibitors in this case having combined with each other and with the distributors to obtain monopoly rights, had formed a conspiracy in violation of §§ 1 and 2 of the Sherman Act. P. 109.

2. The District Court having erroneously dismissed the complaint in this case without making adequate findings as to the effect of the practices found by this Court to be unlawful, the case is remanded to the District Court for further findings and the fashioning of a decree which will undo as near as may be the wrongs that were done and prevent their recurrence in the future. Pp. 109–110.

68 F. Supp. 180, reversed.

In a suit by the United States to restrain violations of §§ 1 and 2 of the Sherman Act, the District Court found that there was no violation of the Act and dismissed the complaint on the merits. 68 F. Supp. 180. On appeal to this Court, *reversed and remanded,* p. 110.

Robert L. Wright argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Milton A. Kallis* and *Robert W. Ginnane.*

Charles B. Cochran argued the cause for appellees. With him on the brief was *John B. Dudley.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit brought by the United States in the District Court to prevent and restrain appellees from violating §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The District Court, finding there was no violation of the Act in any of the respects charged in the complaint, dismissed the complaint on the merits. 68 F. Supp. 180. The case is here by appeal under § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

The appellees are four affiliated corporations and two individuals who are associated with them as stockholders and officers.[1] The corporations operate (or own stock in

[1] Griffith Amusement Co., Consolidated Theatres, Inc., R. E. Griffith Theatres, Inc., Westex Theatres, Inc., H. J. Griffith, and L. C. Griffith. R. E. Griffith, a brother of H. J. and L. C. Griffith, was a defendant, but died while the suit was pending in the District Court and the action was not revived against his estate or personal representative.

corporations which operate) moving picture theatres in Oklahoma, Texas, and New Mexico. With minor exceptions, the theatres which each corporation owns do not compete with those of its affiliates but are in separate towns. In April, 1939, when the complaint was filed, the corporate appellees had interests in theatres in 85 towns. In 32 of those towns there were competing theatres. Fifty-three of the towns (62 per cent) were closed towns, *i. e.* towns in which there were no competing theatres. Five years earlier the corporate appellees had theatres in approximately 37 towns, 18 of which were competitive and 19 of which (51 per cent) were closed. It was during that five-year period that the acts and practices occurred which, according to the allegations of the complaint, constitute violations of §§ 1 and 2 of the Sherman Act.

Prior to the 1938–1939 season these exhibitors used a common agent to negotiate with the distributors for films for the entire circuit.[2] Beginning with the 1938–1939 season one agent negotiated for the circuit represented by two of the corporate appellees, and another agent negotiated for the circuit represented by the other two corporate appellees. A master agreement was usually executed with each distributor covering films to be released by the distributor during an entire season.[3] There were variations among the master agreements. But in the main they provided as follows: (a) They lumped together towns in which the appellees had no competition and towns in which there were competing

[2] The circuit includes the four corporate appellees and their affiliated exhibitors. When less than the full ownership of a theatre was acquired, the contract would provide that the buying and booking of films was exclusively in the hands of the Griffith interests.

[3] The agreement negotiated by the common agent would be executed between a distributor and each of the corporate appellees or between a distributor and an individual exhibitor.

theatres. (b) They generally licensed the first-run exhibition in practically all of the theatres in which appellees had a substantial interest of substantially all of the films to be released by the distributor during the period of a year.[4] (c) They specified the towns for which second runs were licensed for exhibition by appellees, the second-run rental sometimes being included in the first-run rental. (d) The rental specified often was the total minimum required to be paid (in equal weekly or quarterly installments) by the circuit as a whole for use of the films throughout the circuit, the appellees subsequently allocating the rental among the theatres where the films were exhibited. (e) Films could be played out of the order of their release, so that a specified film need not be played in a particular theatre at any specified time.[5]

The complaint charged that certain exclusive privileges which these agreements granted the appellee exhibitors over their competitors unreasonably restrained competition by preventing their competitors from obtaining enough first- or second-run films from the distributors [6] to operate successfully. The exclusive privileges charged as violations were preemption in the selection of films and the receipt of clearances over competing theatres. It

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[4] There were a few franchise agreements covering films to be released by a distributor during a term of years, usually for three years and in one instance for five years.

The theatres of appellees in Oklahoma City were second, not first, run theatres.

[5] The privilege was frequently conditioned on the playing of, or paying for, a designated quantity of the film obligation during stated portions of the season.

[6] Those are the eight major film distributors who originally were defendants. The charge that these distributors conspired with each other was eliminated from the complaint and they were dismissed as defendants by stipulation or on motion of appellant. But the charge that each of the distributors had conspired with the appellee exhibitors was retained.

also charged that the use of the buying power of the entire circuit in acquiring those exclusive privileges violated the Act.

The District Court found no conspiracy between the appellee exhibitors or between them and the distributors, which violated the Act. It found that the agreements under which films were distributed were not in restraint of trade; that the appellees did not monopolize or attempt to monopolize the licensing or supply of film for first run or for any subsequent run; that the appellees did not conspire to compel the distributors to grant them the exclusive privilege of selecting films before the films were made available to any competing exhibitor; that there was no agreement between defendants and distributors granting defendants unreasonable clearances; that the appellees did not compel or attempt to compel distributors to grant them privileges not granted their competitors or which gave them any substantial advantage over their competitors; and that appellees did not condition the licensing of films in any competitive situation on the licensing of such films in a non-competitive situation, or *vice versa*.

The appellant introduced evidence designed to show the effect of the master agreements in some twenty-odd competitive situations. The District Court made detailed findings on this phase of the case to the effect that difficulties which competitors had in getting desirable films after appellee exhibitors entered their towns, the inroads appellees made on the business of competitors, and the purchases by appellees of their competitors were not the result of threats or coercion nor the result of an unlawful conspiracy, but solely the consequence of lawful competitive practices.

In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, a group of affiliated exhibitors, such as we have in the present case, were found to have violated §§ 1 and 2 of the Sherman Act by the pooling of their buying power

and the negotiation of master agreements similar to those we have here. A difference between that case and the present one, which the District Court deemed to be vital, was that in the former the buying power was used for the avowed purpose of eliminating competition and of acquiring a monopoly of theatres in the several towns, while no such purpose was found to exist here. To be more specific, the defendants in the former case through the pooling of their buying power increased their leverage over their competitive situations by insisting that they be given monopoly rights in towns where they had competition, else they would give a distributor no business in their closed towns.

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States* v. *Patten,* 226 U. S. 525, 543; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275. To require a greater showing would cripple the Act. As stated in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432, "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co.* v. *United States,* 196 U. S. 375, 396:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Mas-

> sachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

And see *United States* v. *Aluminum Co. of America, supra,* pp. 431–432. And so, even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act.

Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 61. But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade.[7] Section 2 is not restricted to conspiracies or combinations to monopolize[8] but also makes it a crime for any person to monopolize or to attempt to monopolize any part of

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[7] Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

[8] Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.[9] For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, 811, 814. It is indeed "unreasonable, *per se,* to foreclose competitors from any substantial market." *International Salt Co.* v. *United States,* 332 U. S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America, supra.* It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.[10] He need

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[9] So also a conspiracy to monopolize violates § 2 even though monopoly power was never acquired. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 789.

[10] It was said in *United States* v. *United States Steel Corp.,* 251 U. S. 417, 451, that mere size is not outlawed by § 2. But size is of course an earmark of monopoly power. Moreover, as stated by

not be as crass as the exhibitors in *United States* v. *Crescent Amusement Co., supra,* in order to make his monopoly power effective in his competitive situations. Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. *United States* v. *Patten, supra,* p. 543.

The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed. Large-scale buying is not, of course, unlawful *per se.* It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor, as we hold in *United States* v. *Paramount Pictures, Inc., post,* p. 131, may it be used to stifle competition by denying competitors less favorably situated access to the market.

Justice Cardozo, speaking for the Court in *United States* v. *Swift & Co.,* 286 U. S. 106, 116, "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

Appellees were concededly using their circuit buying power to obtain films. Their closed towns were linked with their competitive towns. No effort of concealment was made as evidenced by the fact that the rental specified was at times the total minimum amount required to be paid by the circuit as a whole. Monopoly rights in the form of certain exclusive privileges were bargained for and obtained. These exclusive privileges, being acquired by the use of monopoly power, were unlawfully acquired. The appellees, having combined with each other and with the distributors to obtain those monopoly rights, formed a conspiracy in violation of §§ 1 and 2 of the Act. It is plain from the course of business that the commerce affected was interstate. *United States* v. *Crescent Amusement Co., supra,* pp. 180, 183–184.

What effect these practices actually had on the competitors of appellee exhibitors or on the growth of the Griffith circuit we do not know. The District Court, having started with the assumption that the use of circuit buying power was wholly lawful, naturally attributed no evil to it and thus treated the master agreements as legitimate weapons of competition. Since it found that no competitors were driven out of business, or acquired by appellees, or impeded in their business by threats or coercion, it concluded that appellees had not violated the Sherman Act in any of the ways charged in the complaint. These findings are plainly inadequate if we start, as we must, from the premise that the circuit buying power was unlawfully employed. On the record as we read it, it cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit. Its extent must be determined on a remand of the cause. We remit to the District Court not only that problem but also the fashioning of a decree which will undo as near as may be the wrongs that were done and prevent their recurrence in the future. See *United*

States v. *Crescent Amusement Co., supra,* pp. 189–190; *Schine Chain Theatres* v. *United States, post,* p. 110; *United States* v. *Paramount Pictures, Inc., post,* p. 131.

Reversed.

MR. JUSTICE FRANKFURTER dissents, substantially for the reasons set forth in the opinion of the District Court, 68 F. Supp. 180.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 10. Argued December 15, 1947.—Decided May 3, 1948.

The United States sued to restrain violations of §§ 1 and 2 of the Sherman Act by a parent corporation, three of its officers and directors and five of its subsidiaries, which owned or had a financial interest in a large chain of motion picture theatres located in six states. The District Court found that they had used the combined buying power of the entire circuit to negotiate master agreements with the major film distributors, which had the effect of depriving competitors of first- and second-run films; obtained from the distributors unreasonable "clearances," long-term agreements for rentals of films and other concessions which gave them unreasonable advantages over competitors; threatened to build theatres or to open closed theatres in order to stop or prevent competition; cut admission prices; obtained from competitors whom they bought out agreements not to compete for long terms of years, which sometimes extended to towns other than those in which the purchased theatres operated; and thus conspired with each other and with the eight major film distributors to violate §§ 1 and 2 of the Sherman Act. The District Court enjoined these practices and ordered defendants to divest themselves of certain theatres. Defendants appealed. *Held:*

1. In negotiating for films, the combining of theatres in towns in which the circuit had a monopoly with those in towns in which it had competitors was a restraint of trade and a use of monopoly power in violation of §§ 1 and 2 of the Sherman Act. *United States* v. *Griffith, ante,* p. 100. P. 116.

2. The concerted action of the parent company, its subsidiaries, and certain of the parent company's officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. P. 116.

3. The negotiations which appellants had with the distributors and which resulted in the execution of master agreements between the distributors and exhibitors brought the distributors into the unlawful combination with the defendants. P. 116.

4. A conspiracy between the exhibitors and each of the named distributors having been established by independent evidence, inter-office letters and memoranda between officials of the distributors were admissible in evidence against all conspirators as declarations of some of the associates, so far as they were in furtherance of the unlawful project. Pp. 116–117.

5. Detailed challenges to certain findings on which the District Court based its holding that appellants had violated the Act are examined and the findings are sustained (pp. 117–124), except in the following respects:

(a) The finding that appellants obtained film-rental concessions not made available to independent operators is not intelligible and is set aside, in order that it may be clarified on remand of the cause. P. 120.

(b) A bare finding that appellants at times cut admission prices without a showing that such action was in purpose or effect employed as an instrument of monopoly power is not adequate to support an injunction against price cutting. Pp. 120–121.

(c) The findings as to "unreasonable clearances" are set aside, in order that the District Court may make further findings which reflect an appraisal of the complex factors bearing on the question of reasonableness. See *United States* v. *Paramount Pictures, Inc., post,* p. 131. Pp. 121–124.

6. Detailed objections to those parts of the decree which enjoined appellants from specified acts or practices are considered and the decree is sustained (pp. 125–126), except in the following respects:

(a) To the extent that provisions of the decree are directed to practices reflected in findings set aside by this Court, they

must be re-examined by the District Court on remand of the cause. P. 125.

(b) The general injunction against "monopolizing" first- and second-run films is set aside, since the precise practices found to have violated the Act should be specifically enjoined. Pp. 125–126.

7. The provisions of the decree which require appellants to divest themselves of certain theatres are set aside so that the District Court can make the findings necessary for an appropriate decree. Pp. 126–130.

(a) In this type of case, an injunction against future violations is not adequate to protect the public interest, and divestiture or dissolution is an essential feature of the decree. P. 128.

(b) Divestiture or dissolution must take account of the present and future conditions of the particular industry as well as past violations. P. 128.

(c) It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation; (2) it deprives the defendants of the benefits of their conspiracy; and (3) it is designed to break up or render impotent the monopoly power which violates the Act. Pp. 128–129.

(d) In applying this remedy, it is essential for the District Court to determine what were the fruits of the unlawful conspiracy and to consider what is the best way of requiring appellants to surrender them. P. 129.

(e) Even after appellants are deprived of the fruits of their conspiracy, it will be necessary for the District Court to consider whether appellants' theatre circuit will still constitute a monopoly power of the kind which the Act condemns, in spite of the restrictive provisions of the decree. Pp. 129–130.

8. The provisions of the decree providing for the dissolution of the pooling agreements, the prohibition against buying or booking films for theatres in which appellants have no financial interest, and the restriction on future acquisitions of theatres, are approved. Pp. 127–130.

63 F. Supp. 229, affirmed in part and reversed in part.

In a suit by the United States to restrain violations of §§ 1 and 2 of the Sherman Act by a large chain of motion picture exhibitors, the District Court entered a decree enjoining certain practices and requiring the chain to

divest itself of certain theatres. 63 F. Supp. 229. On appeal to this Court, *affirmed in part, reversed in part, and remanded,* p. 130.

Bruce Bromley argued the cause for appellants. With him on the brief were *Willard S. McKay, Alfred McCormack* and *Richard T. Davis. Harold R. Medina, Arthur Garfield Hays* and *Osmond K. Fraenkel* were also of counsel.

Robert L. Wright argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Stanley M. Silverberg* and *Philip Marcus.*

Milton Pollack filed a brief for Lawrence J. Carkey et al., as *amici curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to No. 64, *United States* v. *Griffith, ante,* p. 100, and is here by way of appeal from the District Court. The appellants, who were defendants below, are a parent company, three of its officers and directors, and five of its wholly owned subsidiaries—to whom we refer collectively as Schine. As of May 19, 1942, Schine owned or had a financial interest in a chain of approximately 148 motion picture theatres[1] located in 76 towns in 6 states,[2] the greater portion being 78 theatres in 41 towns in New York and 36 theatres in 17 towns in Ohio. Of the 76 towns, 60 were closed towns, *i. e.,* places where Schine had the only theatre or

[1] These figures do not include 18 which were closed and had been or were being converted to other uses.

[2] New York (78), Ohio (36), Kentucky (18), Maryland (12), Delaware (2), Virginia (2).

all the theatres in town.[3] This chain was acquired beginning in 1920 and is the largest independent theatre circuit in the country. Since 1931 Schine acquired 118 theatres. Since 1928 the closed towns increased by 56. In 1941 there were only three towns in which Schine's competitors were playing major film products.

The United States sued to prevent and restrain appellants from violating §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The complaint charged that the Schine interests by pooling their entire circuit buying power in the negotiation of films from the distributors so as to combine its closed and open towns got advantages for itself and imposed restrictions on its competitors which otherwise would not have been possible. It charged that the distributors granted certain favors to Schine which were withheld from Schine's competitors, *e. g.*, giving Schine the first run, refusing at times second runs to Schine's competitors, charging Schine with lower rentals than it charged others, licensing to Schine films in excess of Schine's reasonable requirements.

The complaint also charged that Schine had forced or attempted to force competitors out of business and where competitors would not sell out to Schine had threatened to build or had built an opposition theatre, had threatened to deprive or had deprived competitors of a desirable film or run, had cut admission prices, and had engaged in other unfair practices. In these and other ways it was charged that Schine had used its circuit buying power to maintain its monopoly and to

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[3] Schine had the only theatre in each of 21 towns, both theatres in 21 towns that had two each, all theatres in 16 towns that had three each, and all theatres in one town that had six theatres and in another that had four theatres.

Of these theatres approximately 87 per cent are located in cities or villages with populations under 25,000 and 60 per cent in cities or villages with populations under 10,000.

restrain trade. The conspiracy charged was between the Schine defendants themselves and between them and the distributors.

The District Court found that the appellants had conspired with each other and with the eight major film distributors [4] to violate § 1 and § 2 of the Sherman Act. Its findings may be summarized as follows:

The entire circuit buying power was utilized to negotiate films for all the theatres from the distributors, the negotiations ending in master agreements between a distributor and the exhibitor. This large buying power [5] gave Schine the "opportunity to exert pressure on the distributors to obtain preferences." Moreover, Schine by combining its closed and open towns in its negotiations for films was able "to dictate terms to the distributors." Schine bought films for some theatres in which it had no financial interest (but as respects most of which it had an option to purchase). It also performed the service (under so-called pooling agreements) for groups of theatres in which it and others were interested. Through the use of such buying power Schine arbitrarily deprived competitors of first- and second-run pictures, was able in many towns to secure unreasonable clearances [6] year after year of from 90 to 180 days, obtained long-term agreements for rental of film (franchises) which gave it preferences not given independent operators,[7] and re-

[4] Fox, Loew, Paramount, RKO, Warner, Columbia, Universal, and United Artists.

[5] In the 1939–1940 season Schine paid $1,647,000 to six distributors in film rental.

[6] By clearance is meant the period of time agreed upon which must elapse between runs of the same feature within a particular area or in specified theatres.

[7] The District Court used "independents" or "independent operators" to mean competitors other than the exhibitor-distributors. Schine, of course, is an independent circuit, as that term is used in the industry.

ceived more advantageous concessions from the distributors respecting admission prices than competitors were able to get. Schine made threats to build or to open closed theatres in order to force sales of theatres in various towns or to prevent entry by an independent operator. Schine cut admission prices. Schine obtained from competitors whom it bought out agreements not to compete for long terms of years which agreements at times extended to other towns as well. Schine obtained film-rental concessions not made available to independents. The District Court entered a decree enjoining these practices and requiring a divestiture by Schine of various of its theatres. 63 F. Supp. 229.

First. For the reasons stated in *United States* v. *Griffith, ante,* p. 100, the combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of § 1 and § 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 227; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173. The negotiations which Schine had with the distributors resulted in the execution of master agreements between the distributors and exhibitors. This brought the distributors into unlawful combinations with the Schine defendants. See *United States* v. *Paramount Pictures, Inc., post,* p. 131. The course of business makes plain that the commerce affected was interstate. *United States* v. *Crescent Amusement Co., supra,* pp. 180, 183–184.

Second. Appellants object to admission in evidence of numerous inter-office communications between officials of the distributors with whom Schine dealt. The District Court placed considerable reliance on them in mak-

ing its findings. We will advert later to the use of these documents to prove the unreasonableness of clearances. It is sufficient at this point to say that since a conspiracy between Schine and each of the named distributors was established by independent evidence, these inter-office letters and memoranda were admissible against all conspirators as declarations of some of the associates so far as they were in furtherance of the unlawful project. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *United States* v. *Crescent Amusement Co., supra,* p. 184; *United States* v. *Gypsum Co.,* 333 U. S. 364, 393.

Third. Appellants make detailed challenges to many of the other findings of the District Court on which it based its holdings that appellants violated the Act.

(1) They vigorously attack the findings that Schine arbitrarily deprived independents of first- and second-run pictures. Their chief contention is that there is no support for the finding of arbitrary action on the part of Schine, that Schine did not buy pictures beyond its needs in order to keep them away from its competitors, that any successful purchaser of a first- or second-run picture has an exclusive privilege that necessarily deprives competitors of the film for the period of the run, and that any advantage which Schine obtained in this regard was the result of the operation of forces of competition.

As we read the evidence underlying this finding, it was the use of Schine's monopoly power—represented by combining the buying power of the open and closed towns—which enabled it to obtain that which its competitors could not obtain. Deprivation of competitors of first- and second-run pictures in that way was indeed arbitrary in the sense that it was the product of monopoly power, not of competitive forces. That is the construction we give the finding of the District Court; and as so construed it is supported by substantial evidence. There may be exceptions in the case of some subsidiary

findings. But we do not stop to relate them. For even if we lay them aside as clearly erroneous for lack of support in the evidence, the conclusion is irresistible that Schine so used its monopoly power to gain advantages and preferences which, on a purely competitive basis, it could not have achieved.

(2) Defense of the long-term film-rental agreements—the franchises—is made on the ground that they were accepted methods of doing business in the industry,[8] that they were favored by distributors as devices to stabilize their end of the business and to save expense, and that they were not chosen by Schine as instruments to suppress competition. But it seems to us apparent that their use served to intensify the impact of Schine's monopoly power on its competitors. For when Schine's buying power was used to acquire films produced by a distributor for two or three years rather than for one year alone, it plainly strengthened through the exercise of monopoly power such dominant position as Schine had over each of its competitors.

Appellants also challenge the finding that Schine obtained preferences through the franchises, in addition to long-term supplies of pictures, which were not granted independent operators. One of these preferences was found to be the unfair and inequitable clearance provisions; another, special film-rental concessions. We will consider these later. The other aspects of the findings we do not stop to analyze. For the franchise agreements as employed by Schine are unreasonable restraints of trade for the reasons stated; and they must be permanently en-

[8] A consent order was entered in the present case on May 19, 1942, which provided, *inter alia*, that appellants would not enter into any agreement licensing films released by any distributor during a period of more than one year and that all agreements in existence having a longer term should be void as to all films released after the thirtieth day following the date of the consent order.

joined, even though we assume their collateral aspects are not accurately described by the District Court and so may not be condemned.

(3) Appellants challenge the finding that Schine made threats to build theatres or to open closed ones in order to force sales of theatres in various towns or to prevent entry by an independent operator. There are inaccuracies in some of the subsidiary findings. There are episodes which are susceptible of two interpretations, one wholly innocent and the other unlawful. There are still other episodes which have the unmistakable earmarks of the use of monopoly power with intent to expand an empire and to restrain competition. On the whole we think the District Court was justified in drawing the inference of unlawful purpose from the ambiguous episodes and that those coupled with the others are adequate to support these findings of the District Court.

(4) We reach the same result as respects the agreements not to compete which Schine exacted from competitors whom it bought out. It is not enough that the agreements may be valid under local law. Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. See *United States* v. *American Tobacco Co.*, 221 U. S. 106, 174; *United States* v. *Crescent Amusement Co., supra,* p. 181. If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices, it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended.

(5) The finding that Schine obtained film-rental concessions not made available to independent operators is not intelligible to us. For the District Court went on to state that "These provisions were also in contracts with independents." How those concessions constitute a restraint of trade is therefore not apparent. We set aside this finding so that it may be clarified on remand of the cause.

(6) There is challenge to the findings that Schine's rental agreements contained minimum admission prices, or minimum admission prices lower than those to be charged by the independent operators for subsequent runs, or relieved Schine of requirements for minimum admission prices though imposing them on its competitors. There is evidence to support the findings that minimum prices were fixed. It is well settled that the fixing of minimum prices, like other types of price fixing, is unlawful *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. The findings that Schine was either granted minimum admission prices more favorable than those required of its competitors, or that Schine, unlike its competitors, was relieved of all requirements for minimum prices, are also supported by evidence. It is said that these provisions of the agreements were not adhered to. But since they did exist, it is not for us to speculate as to what force or sanction they may have had.

(7) There is also challenge to the finding that Schine cut admission prices. This seems uncontroverted. But price cutting without more is not a violation of the Sherman Act. It is indeed a competitive practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful *per se*, facts and circumstances must be adduced to show that it was in purpose or effect employed as an

instrument of monopoly power. Here there is nothing except a bare finding that at times Schine cut admission prices. That finding is not sufficiently discriminating to withstand analysis and is not adequate to support an injunction against price cutting.

(8) The finding as to unreasonable clearances presents rather large issues. We have elaborated the point in *United States* v. *Paramount Pictures, Inc., post,* p. 131, and need not repeat what is said there. Clearance is an agreement by a distributor not to exhibit a film nor to license others to do so within a given area and for a stated period after the last date of the showing of the film by the licensee with whom the agreement is made.[9] It is, in other words, an agreement by a distributor to license films only for specified successive dates. It is in part designed to protect the value of the license which is granted. While it thus protects the income of the first exhibitor, there is no contention that clearance agreements are *per se* unlawful restraints on competition by reason of the effect they may have on admission prices or otherwise. All the District Court purported to condemn, and all the appellee maintains is unlawful, are "unreasonable clearances." If reasonableness is the test, the factors which bear on it would appear to be numerous.[10] The findings and opinion of the District Court, however, do not greatly

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[9] See note 6, *supra.*

[10] See Bertrand, Evans & Blanchard, The Motion Picture Industry—A Pattern of Control 40–41 (TNEC Monograph No. 43, 1941):

"The establishment of clearance schedules is an intricate procedure. It involves a complex bargaining process and the balance of a variety of opposing economic interests. It may be stated initially that the primary objective of the distributor is, of course, to maximize his total revenue from each picture. This aim gives him a very direct interest in clearance periods. The higher rental fees paid by the prior-run exhibitor are directly conditioned on the extent of the protection which he is granted, and in general the longer the clearance

illuminate the problem. What standards or criteria of unreasonableness were applied does not clearly appear. There are, however, in some of the subsidiary findings in this case a few clues as to the basis used by the District Court in classifying clearances as unreasonable. Thus it said that Schine got some clearances "over towns in which Schine did not operate." But that is irrelevant to the problem of reasonableness of clearances, since by definition clearances run to both theatres and towns not owned by him who has the clearance.

The District Court also found that clearances "were given over towns over which there had been no previous clearance." But that without more would not make a clearance "unreasonable." The District Court found that Schine got clearances over "some towns distant from 10 to upwards of 20 miles" and that clearances were also obtained over "outside towns of comparably small popula-

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period before subsequent showing, the higher the rental fee the prior-run exhibitor will pay.

"On the other hand, the distributor's revenue from subsequent-run exhibition is also important to him; this income may mean the difference between black or red ink on his ledgers. But the longer the clearance period, the smaller will be these returns—not only because more customers will have attended the prior showing rather than wait for subsequent exhibition, but also because the effects of the advertising and exploitation efforts made when the picture was released will have been vitiated over this time. In general, the greater the total box-office return earned by a film in all showings, the greater will be the distributor's revenue.

. . . . .

"The relation between run, clearance and zoning, admission price, seating capacity, and rental fees is indeed a complex one. The range covered by these factors is indicated by this fact: a license fee amounting to many thousands of dollars may be paid for the first showing of a film in a large metropolitan theater, and within a year the same film may be exhibited in some small theater in the same city for a fee of less than $20."

tion, distant so far that no clearance is justified." If the basis for these findings is that the towns were in different competitive areas, it would come closest to revealing the standard used by the District Court in determining whether the clearances were or were not reasonable, unless possibly it be the finding that in a few instances Schine got clearances over towns where there were no theatres.

The District Court cites instances of clearances which in its view were illegal because unreasonable as to time. But some of these turn out to be situations where clearances were granted over towns where Schine had the only theatre in town. So perhaps the District Court used as a basis for some of its findings of unreasonable clearances the absence of any competition between the theatres in question. But as to that we can only guess in each case and then wonder whether our guess was correct, because appellee suggests that one vice of Schine's clearances was that they ran not to specified theatres but to specified towns. We are, however, left somewhat in the dark whether the District Court followed that theory or made the reasonableness of clearances turn on whether or not the theatres affected were in different competitive areas.

Appellee also suggests that proof of the unreasonableness of Schine's clearances is that their periods were almost uniformly the same even though there were wide variations in the condition and size of theatres and of the type of pictures played in the various theatres. But we are given no clue in the findings whether that was the view of the District Court. On its face it seems more like an attempt of the appellee to show what findings could have been made on the basis of the record had some discrimination been made in appraising the evidence.

Appellee seems to argue that standards of reasonableness can be dispensed with by reason of statements in the

inter-office memoranda of the distributors that many of Schine's clearances were "unreasonable." On the matter of clearances, however, the interests of distributors and exhibitors are not necessarily identical. For the self-interest of exhibitors which would call for long clearances would militate against the best interests of distributors.[11] So it is not clear that these declarations can properly be said to fall within the scope of the unlawful project which the two groups were sponsoring. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 647–648. But however that may be, these statements do not advance us very far with the problem because they too fail to give specific content to the concept of unreasonable as applied to clearances.

As a last resort appellee seeks to sustain these findings on the ground that Schine got at least some of its clearances by refusing to make any deal for the circuit unless its terms were met. But any clearance so obtained, though otherwise reasonable, would be unlawful, for it would be the product of the exercise of monopoly power. It is evident, however, that that was not the theory adopted by the District Court for it did not look to see what clearances had been obtained in that manner.

The short of the matter is that since we do not know for certain what the findings of the District Court on clearances mean, they must be set aside. In doing so we of course do not intimate here, any more than we do in case of the other findings we have set aside in the case, that the record would not sustain findings adverse to Schine. We only hold that before we can pass on the questions tendered, findings on clearances must be made which reflect an appraisal of the complex of factors bearing on this question of reasonableness. That is a function of the District Court.

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[11] See note 10, *supra.*

Fourth. The decree entered by the District Court enjoins appellants from specified acts or practices.[12] To the extent that these provisions are directed to practices reflected in findings which we set aside, they must be re-examined by the District Court on remand of the case.

Appellants object to the generality of the injunction against "monopolizing" first- and second-run films.[13] The

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[12] This part of the decree provides:

"Each of the defendants is hereby enjoined and restrained:

"1. From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof and from monopolizing the supply of second run film in any situation where there is a suitable theatre for second run exhibition thereof.

"2. From demanding or receiving clearance over theatres operated by others which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever.

"3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation and from entering into any film franchise.

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"5. From enforcing any existing agreements heretofore entered into (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes.

"6. From using any threats or deception as a means whereby a competitor is induced to sell.

"7. From continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States."

[13] See note 12, *supra,* paragraph 1.

statutory requirement is that these injunctions "shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained." 38 Stat. 738, 28 U. S. C. § 383. And see Fed. R. Civ. P., 65 (d). We need not determine whether the provision in question if read, as it must be, in light of the other paragraphs of the decree (*Swift & Co.* v. *United States,* 276 U. S. 311, 328) would pass muster. For we think the public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have violated the act should be specifically enjoined.

We have considered the objections to the other parts of the injunction (apart from provisions as to divestiture which we discuss later) and find them without merit.

Fifth. The District Court included in its decree a divestiture provision adjudging that appellant companies be "dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained." The parties subsequently submitted various plans and after hearings the one submitted by the Department of Justice was approved with modifications. The plan does not provide for the dissolution of the Schine circuit through the separation of the several affiliated corporations as was done in *United States* v. *Crescent Amusement Co., supra,* pp. 188–189. It keeps the circuit intact in that sense but requires Schine to sell certain theatres. The plan requires Schine to sell its interest in all but one theatre of its selection in each of 33 towns, all but two in each of four larger towns, and two of four theatres in Rochester, New York.[14] Schine is to be divested of

[14] It also requires Schine to sell specific theatres remaining unsold under the consent decree of May 19, 1942.

more than 50 of its theatres. The towns affected are over 40 out of the 70-odd in which Schine is operating.[15] The one-theatre towns of Schine are unaffected.

The decree also dissolves the pooling agreements. A trustee is appointed to make the sales which are ordered. Schine is prohibited from acquiring any financial interest in additional theatres "except after an affirmative showing that such acquisition will not unreasonably restrain competition." Schine is ordered not to buy or book films for any theatre other than those in which it owns a financial interest. The District Court concluded that this program of divestiture was necessary in order to restore "free enterprise and open competition amongst all branches of the motion picture industry."

As we have noted, the District Court did not follow the procedure of *United States* v. *Crescent Amusement Co., supra,* and order the dissolution of the combination of the affiliated corporations. Schine presented such a plan and it was rejected. That plan contemplated the division of the Schine theatres among three separate corporations, with members of the Schine family owning each corporation. The District Court rejected that plan because it did not furnish such separation of ownership as would assure discontinuance of the practices which had constituted violations of the Act. The District Court did not pursue further the prospect of dismemberment of the Schine circuit through separation of the theatres into geographical groupings under separate and unaffiliated ownerships. Nor do the findings reflect an inquiry to determine what theatres had been acquired by Schine through methods which violate the Act. So far as the findings reveal, the theatres which are ordered divested may be properties which in whole or in part were lawfully ac-

[15] Schine had withdrawn from five towns pursuant to the consent order of May 19, 1942.

quired; and theatres which Schine is permitted to retain may, so far as the findings reveal, be ones which it obtained as the result of tactics violating the Act.

In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees. See *United States* v. *Crescent Amusement Co., supra,* p. 189, and cases cited.

To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project. Nor is *United States* v. *National Lead Co.,* 332 U. S. 319, 351–353, opposed to this view. For in that case there was no showing that the plants sought to be divested were either unlawfully acquired or used in a manner violative of the antitrust laws.

Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy.

(3) It is designed to break up or render impotent the monopoly power which violates the Act. See *United States* v. *Crescent Amusement Co., supra,* pp. 188–190; *United States* v. *Griffith, ante,* p. 100.

The last two phases of this problem are the ones presented in this case. But the District Court purported to deal with only one of them. It did not determine what dividends Schine had obtained from the conspiracy. In *United States* v. *Crescent Amusement Co., supra,* pp. 181, 189, some of the affiliated corporations through which that empire was built were products of the conspiracy. Hence that fact without more justified the direction in the decree to unscramble them. There are no findings which would warrant such a course in this case. But an even more direct method of causing appellants to surrender the gains from their conspiracy is to require them to dispose of theatres obtained by practices which violate the antitrust acts. We do not know what findings on that score would be supported by the record, for the District Court did not address itself to the problem. The upshot of the matter is that the findings do not reveal what the rewards of the conspiracy were; and consequently the court did not consider what would be the preferable way of causing appellants to surrender them. The case must therefore be remanded so that the District Court may make appropriate findings on this phase of the case.

While such an inquiry is the starting point for determining to what extent divestiture should be ordered, the matter does not end there. For it may be that even after appellants are deprived of the fruits of their conspiracy, the Schine circuit might still constitute a monopoly power of the kind which the Act condemns (see *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, 811), in spite of the restrictive provisions of the decree.

Monopoly power is not condemned by the Act only when it was unlawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed. *United States* v. *Griffith, ante,* p. 100; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432. But whether that condition will obtain in this case must await the findings on the other phase of the case.

We accordingly set aside the divestiture provisions of the decree so that the District Court can make the findings necessary for an appropriate decree. We approve the dissolution of the pooling agreements, the prohibition against buying or booking films for theatres in which Schine has no financial interest, and the restriction on future acquisitions of theatres. See *United States* v. *Crescent Amusement Co., supra,* pp. 185–187. We do not reach the question of the appointment of a trustee to sell theatres as that merely implements the divestiture provisions which must be reconsidered by the District Court.

The judgment of the District Court is affirmed in part and reversed in part and the cause is remanded to it for proceedings in conformity with this opinion.

So ordered.

Mr. Justice Frankfurter concurs in the result.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of the case.

UNITED STATES v. PARAMOUNT PICTURES, INC. ET AL.

NO. 79. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued February 9–11, 1948.—Decided May 3, 1948.

The United States sued to restrain violations of §§ 1 and 2 of the Sherman Act by (1) five corporations which produce motion pictures and their respective subsidiaries or affiliates which distribute and exhibit films and own or control theatres, (2) two eorporations which produce motion pictures and their subsidiaries which distribute films, and (3) one corporation engaged only in the distribution of motion pietures. The complaint charged that the first group of defendants conspired to and did restrain and monopolize interstate trade in the exhibition of motion pictures in most of the larger cities of the country and that their combination of producing, distributing and exhibiting motion pictures violated §§ 1 and 2 of the Act. It also charged that all of the defendants, as distributors, conspired to and did restrain and monopolize interstate trade in the distribution and exhibition of films. After a trial, the District Court granted an injunction and other relief. *Held:*

1. The District Court's finding that price-fixing conspiracies existed between all defendants and between each distributor-defendant and its licensees, which resulted in exhibitors being required to charge substantially uniform minimum admission prices, is sustained. Pp. 141–142.

2. Its injunction against defendants or their affiliates granting any license (except to their own theatres) in which minimum prices for admission to a theatre are fixed, is sustained. Pp. 142–144.

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*Together with No. 80, *Loew's, Incorporated et al.* v. *United States;* No. 81, *Paramount Pictures, Inc. et al.* v. *United States;* No. 82, *Columbia Pictures Corp. et al.* v. *United States;* No. 83, *United Artists Corp.* v. *United States;* No. 84, *Universal Corp. et al.* v. *United States;* No. 85, *American Theatres Assn., Inc. et al.* v. *United States et al.;* and No. 86, *Allred et al.* v. *United States et al.*, also on appeal from the same court.

(a) The fact that defendants owned copyrights to their films and merely licensed their use by exhibitors did not entitle them to conspire with each other to fix uniform prices of admission to be charged by exhibitors. P. 143.

(b) Nor did it justify the conspiracy between each distributor-defendant and its licensees to fix and maintain uniform minimum admission prices which had the effect of suppressing price competition between exhibitors. Pp. 143–144.

(c) A copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. P. 144.

3. The District Court's finding that there was a conspiracy to restrain trade by imposing unreasonable "clearances" is sustained. Pp. 144–147.

4. Its injunction against defendants and their affiliates agreeing with each other or with any exhibitors or distributors to maintain a system of "clearances," or granting any "clearance" between theatres not in substantial competition, or granting or enforcing any "clearance" against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee, is sustained. Pp. 147–148.

(a) A request that it be construed or modified so as to allow licensors in granting "clearances" to take into consideration what is reasonably necessary for a fair return to the licensor is rejected. Pp. 147–148.

(b) In the setting of this case, the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords. P. 148.

5. A provision of the decree that, "Whenever any clearance provision is attacked as not legal . . . the burden shall be upon the distributor to sustain the legality thereof," is sustained. P. 148.

6. The District Court's finding that the exhibitor-defendants had "pooling agreements" whereby normally competitive theatres were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages, and that these agreements resulted in the elimination of competition *pro tanto* both in exhibition and in distribution of feature pictures, is sustained. P. 149.

7. Its requirement that existing "pooling agreements" be dissolved and its injunction against any future arrangement of that character are sustained. P. 149.

8. Its findings as to the restraint of trade by means of arrangements under which many theatres are owned jointly by two or more exhibitor-defendants, its requirement that the exhibitor-defendants terminate such joint ownership of theatres, and its injunction against future acquisitions of such interests, are sustained. Pp. 149–151.

9. Its order that certain other relationships involving joint ownership of theatres by an exhibitor-defendant and an independent be dissolved and its injunction against future acquisitions of such joint interests must be revised after further inquiries and findings upon remand of the cases. Pp. 151–153.

(a) It erred in failing to inquire into the circumstances under which each particular interest had been acquired and in treating all relationships alike in this portion of the decree. P. 152.

(b) To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested and no permission to buy out the other owner should be given a defendant. P. 152.

(c) Even if lawfully acquired, divestiture of such interests would be justified if they have been utilized as part of the conspiracy to eliminate or suppress competition. P. 152.

(d) If the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed, even though the affiliation was innocently acquired. P. 153.

(e) In those instances where joint ownership involves no more than innocent investments by those who are not actual or potential operators and it was not used in furtherance of the conspiracy and did not result in a monopoly, its retention by defendants would be justified and they might be given permission to acquire the interests of the independents on a showing by them and a finding by the Court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. P. 153.

10. The District Court's findings that certain "formula deals" covering the exhibition of feature pictures in entire circuits of theatres and certain "master agreements" covering their exhibition in two or more theatres in a particular circuit unlawfully restrain

trade, and its injunction against the making or further performance of such arrangements, are sustained. Pp. 153–155.

(a) Such arrangements are devices for stifling competition and diverting the cream of the business to the large operators. P. 154.

(b) The pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines theatres having no competitors with those having competitors. *United States* v. *Griffith, ante,* p. 100; *Schine Chain Theatres* v. *United States, ante,* p. 110. Pp. 154–155.

(c) Distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. P. 155.

11. The findings of the District Court with reference to "franchises" whereby exhibitors obtain all feature pictures released by a distributor over a period of more than a motion picture season are set aside, so that the court may examine the problem in the light of the elimination from the decree of the provision for competitive bidding. Pp. 155–156.

12. On the record in this case, it cannot be said that "franchises" are illegal *per se* when extended to any theatre or circuit no matter how small. P. 156.

13. The findings of the District Court as to "block-booking" and its injunction against defendants performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features, are sustained. Pp. 156–159.

(a) The result of this practice is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses. P. 158.

(b) *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, distinguished. P. 159.

(c) The selling of films in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film is not illegal; but it is illegal to refuse to license one or more copyrights unless another copyright is accepted. P. 159.

14. The provision of the decree regulating the practice of "blind-selling," whereby a distributor licenses a feature picture before the exhibitor is afforded an opportunity to view it, is sustained. P. 157, n. 11.

15. The District Court's findings that defendants had unreasonably discriminated against small independent exhibitors and in

favor of large affiliated and unaffiliated circuits through various kinds of contract provisions and that these discriminations resulted in restraints of trade in violation of the Sherman Act, are sustained. Pp. 159–160.

16. On remand of these cases, the District Court should provide effective relief against continuance of these discriminatory practices, in the light of the elimination from the decree of the provision for competitive bidding. P. 161.

17. That large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto defendants is no excuse, if true; since acquiescence in an illegal seheme is as much a violation of the Sherman Act as the creation and promotion of one. P. 161.

18. The requirement of the decree that films be licensed on a competitive bidding basis should be eliminated, because it would involve the judiciary too deeply in the daily operation of this nation-wide business and would uproot business arrangements and established relationships without opening up to competition the markets which defendants' unlawful restraints have dominated. Pp. 161–166.

19. On remand of these cases, the freedom of the District Court to reeonsider the adequacy of the decree in the light of the elimination of the provision for competitive bidding is not limited to those parts specifically indicated. P. 166.

20. Motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment; but the problem involved in these cases bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations. Pp. 166–167.

21. The findings of the District Court on the subjects of monopoly in exhibition and the need for divestiture are set aside as being deficient in the light of the principles stated in this opinion, in *United States* v. *Griffith, ante,* p. 100, and in *Schine Chain Theatres* v. *United States, ante,* p. 110, and because of the elimination from the decree of the provisions for eompetitive bidding. The injunetion against the five major defendants expanding their theatre holdings in any manner is also set aside, in order that the District Court may make an entirely fresh start on these phases of the problems. Pp. 167–175.

(a) In determining the need for divestiture, it is not enough to conclude, as the District Court did, that none of the defendants

was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five major defendants through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. P. 171.

(b) When the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were, even if they fell short of monopoly. P. 171.

(c) While a monopoly resulting from the ownership of the only theatre in a town usually does not constitute a violation of the Sherman Act, even such an ownership is vulnerable in a suit under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. *United States* v. *Griffith, ante,* p. 100. P. 171.

(d) The problem of the District Court did not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched their conspiracy; its function includes also undoing what the conspiracy achieved. P. 171.

(e) The problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." P. 172.

(f) It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. P. 172.

(g) The fruits of the conspiracy must be denied to the five major defendants, as they were to the independents in *Schine Chain Theatres* v. *United States, ante,* p. 110. P. 172.

(h) Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved and § 2 condemns monopoly of any appreciable part of trade or commerce. P. 173.

(i) Specific intent is not a necessary element of a purpose or intent to create a monopoly; the requisite purpose or intent is present if monopoly results as a necessary consequence of what was done. P. 173.

(j) Monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised; the existence of the power to exclude competition when it is

desired to do so is itself a violation of § 2, if it is coupled with the purpose or intent to exercise that power. P. 173.

(k) The setting aside of the provision of the decree enjoining the five major defendants from further expanding their theatre holdings is not to be taken as intimating in any way that the District Court erred in including this prohibition. P. 175.

22. Vertical integration of producing, distributing and exhibiting motion pictures is not illegal *per se;* its legality depends upon (1) the purpose or intent with which it was conceived or (2) the power it creates and the attendant purpose or intent. Pp. 173–174.

(a) It violates the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. P. 174.

(b) A vertically integrated enterprise will constitute a monopoly which, though unexercised, violates the Sherman Act, if a power to exclude competition is coupled with a purpose or intent to do so. P. 174.

(c) The fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. P. 174.

(d) Likewise bearing on the question whether monopoly power is created by a vertical integration, is the nature of the market to be served and the leverage on the market which the particular vertical integration creates or makes possible. P. 174.

23. Whether an injunction against the licensing of films among the five major defendants would, in the absence of competitive bidding, serve as a short-range remedy in certain situations to dissipate the effects of the conspiracy is a question for the District Court. P. 175.

24. The District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws; but it may authorize the maintenance of a voluntary system of arbitration by those parties who consent, and it may provide the rules and procedure under which such a system is to operate. P. 176.

(a) The Government did not consent to a permanent system of arbitration under the consent decree. P. 176.

(b) Whether a voluntary system of arbitration should be inaugurated is for the discretion of the District Court. P. 176.

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25. In view of the elimination from the decree of the provision for competitive bidding, the District Court's denial of motions of certain associations of exhibitors and a number of independent exhibitors for leave to intervene in opposition to the system of competitive bidding is affirmed and their motions for leave to intervene in this Court are denied. Pp. 176–178.

66 F. Supp. 323; 70 F. Supp. 53, affirmed in part and reversed in part.

In a suit by the United States to restrain violations of §§ 1 and 2 of the Sherman Act by major motion picture producers, distributors and exhibitors, the District Court granted an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53. On appeal to this Court, *affirmed in part, reversed in part and remanded,* p. 178.

Attorney General Clark and *Assistant Attorney General Sonnett* argued the cause for the United States in No. 79, and *Robert L. Wright* for the United States in Nos. 80–86. *Solicitor General Perlman, Mr. Sonnett, Mr. Wright, Kenneth L. Kimble, Stanley M. Silverberg* and *Philip Marcus* were on the briefs.

John W. Davis argued the cause for Loew's Incorporated, appellant in No. 80. With him on the brief were *J. Robert Rubin, S. Hazard Gillespie, Jr.* and *Benjamin Melniker.*

William J. Donovan argued the cause for the Radio-Keith-Orpheum Corp. et al., appellants in No. 80. With him on the brief were *George S. Leisure, Ralstone R. Irvine, Gordon E. Youngman* and *Roy W. McDonald.*

Joseph M. Proskauer argued the cause for Warner Bros. Pictures, Inc. et al., appellants in No. 80. With him on the brief were *Robert W. Perkins* and *Harold Berkowitz.*

James F. Byrnes argued the cause for the Twentieth Century-Fox Film Corp. et al., appellants in No. 80.

With him on the brief were *Otto E. Koegel, John F. Caskey* and *Frederick W. R. Pride.*

Whitney North Seymour argued the cause for Paramount Pictures, Inc. et al., appellants in No. 81. With him on the brief were *Louis Phillips* and *Albert C. Bickford.*

Louis D. Frohlich argued the cause for Columbia Pictures Corp. et al., appellants in No. 82. With him on the brief was *Arthur H. Schwartz.*

George A. Raftery argued the cause for the United Artists Corp., appellant in No. 83. With him on the brief were *Edward C. Raftery* and *Arthur F. Driscoll. T. Newman Lawler* was also of counsel.

Thomas Turner Cooke argued the cause for Universal Pictures Co., Inc. et al., appellants in No. 84. With him on the brief were *Adolph Schimel* and *Frank W. Ford.*

Thurman Arnold argued the cause for the American Theatres Association, Inc. et al., appellants in No. 85. With him on the brief were *Paul Williams* and *Milton W. Freeman.*

John G. Jackson and *Robert T. Barton, Jr.* argued the cause for Allred et al., appellants in No. 86. With them on the brief was *George B. Brooks.*

Briefs of *amici curiae* supporting the United States in No. 79 were filed by *Abram F. Myers* for the Conference of Independent Exhibitors' Associations; *Morris L. Ernst, Loyd Wright* and *James M. Barnes* for the Society of Independent Motion Picture Producers; *Herman M. Levy* for independent members of the Motion Picture Theatre Owners of America; and *Harold J. Sherman, Wendell Berge, James Lawrence Fly* and *C. Dickerman Williams* for the American Civil Liberties Union.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on appeal [1] from a judgment of a three-judge District Court [2] holding that the defendants had violated § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53.

The suit was instituted by the United States under § 4 of the Sherman Act to prevent and restrain violations of it. The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporation and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artists Corporation, which is engaged only in the distribution of motion pictures. The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.

The complaint charged that the producer defendants had attempted to monopolize and had monopolized the production of motion pictures. The District Court found to the contrary and that finding is not challenged here. The complaint charged that all the defendants, as distributors, had conspired to restrain and monopolize and

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[1] Sec. 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

[2] The court was convened pursuant to the provisions of the Act of April 6, 1942, 56 Stat. 198, 199, 15 U. S. C. § 28.

had restrained and monopolized interstate trade in the distribution and exhibition of films by specific practices which we will shortly relate. It also charged that the five major defendants had engaged in a conspiracy to restrain and monopolize, and had restrained and monopolized, interstate trade in the exhibition of motion pictures in most of the larger cities of the country. It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants violated § 1 and § 2 of the Act. It charged that each distributor-defendant had entered into various contracts with exhibitors which unreasonably restrained trade. Issue was joined; and a trial was had.[3]

First. Restraint of Trade—(1) *Price Fixing.*

No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed. The District Court found that the defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge, whether the rental of the film was a flat amount or a percentage of the receipts. It found that substantially uniform minimum prices had been established in the licenses of all defendants. Minimum prices were established in master agreements or franchises which were made between various defendants as distributors and various defendants as exhibitors and in joint operating agreements made by the five majors with each other

[3] Before trial, negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period the United States moved for trial against all the defendants.

and with independent theatre owners covering the operation of certain theatres.[4] By these later contracts minimum admission prices were often fixed for dozens of theatres owned by a particular defendant in a given area of the United States. Minimum prices were fixed in licenses of each of the five major defendants. The other three defendants made the same requirement in licenses granted to the exhibitor-defendants. We do not stop to elaborate on these findings. They are adequately detailed by the District Court in its opinion. See 66 F. Supp. 334–339.

The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit* v. *United States*, 306 U. S. 208, 226–227; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275. That was shown here.

On this phase of the case the main attack is on the decree which enjoins the defendants and their affili-

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[4] A master agreement is a licensing agreement or "blanket deal" covering the exhibition of features in a number of theatres, usually comprising a circuit.

A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

An independent as used in these cases means a producer, distributor, or exhibitor, as the context requires, which is not a defendant in the action, or a subsidiary or affiliate of a defendant.

ates from granting any license, except to their own theatres, in which minimum prices for admission to a theatre are fixed in any manner or by any means. The argument runs as follows: *United States* v. *General Electric Co.*, 272 U. S. 476, held that an owner of a patent could, without violating the Sherman Act, grant a license to manufacture and vend, and could fix the price at which the licensee could sell the patented article. It is pointed out that defendants do not sell the films to exhibitors, but only license them and that the Copyright Act (35 Stat. 1075, 1088, 17 U. S. C. § 1), like the patent statutes, grants the owner exclusive rights.[5] And it is argued that if the patentee can fix the price at which his licensee may sell the patented article, the owner of the copyright should be allowed the same privilege. It is maintained that such a privilege is essential to protect the value of the copyrighted films.

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Masonite Corporation*, *supra*. We recently held in *United States* v. *Gypsum Co.*, 333 U. S. 364, 400, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

Nor can the result be different when we come to the vertical conspiracy between each distributor-defendant and his licensees. The District Court stated in its findings:

> "In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to

[5] See note 12, *infra*.

> the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices."

That consequence seems to us to be incontestable. We stated in *United States* v. *Gypsum Co., supra,* p. 401, that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that *United States* v. *General Electric Co., supra,* as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See *Interstate Circuit* v. *United States, supra,* p. 230.

(2) *Clearances and Runs.*

Clearances are designed to protect a particular run of a film against a subsequent run.[6] The District Court

[6] A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next

found that all of the distributor-defendants used clearance provisions and that they were stated in several different ways or in combinations: in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; or in terms of clearances as fixed by other distributors.

The Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here. In its view their justification was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly diminished. A clearance when used to protect that interest of the exhibitor was reasonable, in the view of the court, when not unduly extended as to area or duration. Thus the court concluded that although clearances might indirectly affect admission prices, they do not fix them and that they may be reasonable restraints of trade under the Sherman Act.

The District Court held that in determining whether a clearance is unreasonable, the following factors are relevant:

> (1) The admission prices of the theatres involved, as set by the exhibitors;
>
> (2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

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subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

It reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343–346, that many clearances had no relation to the competitive factors which alone could justify them.[7] The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the

[7] Thus the District Court found:

"Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances.

The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted.

Some of the defendants ask that this provision be construed (or, if necessary, modified) to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor. We reject that suggestion. If that were allowed, then the exhibitor-defendants would have an easy method of keeping alive at least some of the consequences of the effective conspiracy which they launched. For they could then justify clearances granted by other distributors in favor of their theatres in terms of the competitive requirements of those theatres, and at the same time justify the restrictions they impose upon independents in terms of the necessity of protecting their film rental as licensor. That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked. It plainly should not be allowed so long as the exhibitor-defendants own theatres. For in its baldest terms it is in the hands of the defendants no less than a power to restrict the competition of others in the way

deemed most desirable by them. In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords.

Whether the same restrictions would be applicable to a producer who had not been a party to such a conspiracy is a question we do not reach.

Objection is made to a further provision of this part of the decree stating that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724. The court certainly then could take the lesser step of making them *prima facie* invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188.

(3) *Pooling Agreements; Joint Ownership.*

The District Court found the exhibitor-defendants had agreements with each other and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages. Some of these agreements provided that the parties might not acquire other competitive theatres without first offering them for inclusion in the pool. The court concluded that the result of these agreements was to eliminate competition *pro tanto* both in exhibition and in distribution of features,[8] since the parties would naturally direct the films to the theatres in whose earnings they were interested.

The District Court also found that the exhibitor-defendants had like agreements with certain independent exhibitors. Those alliances had, in its view, the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool. The court found that in some cases the operating agreements were achieved through leases of theatres, the rentals being measured by a percentage of profits earned by the theatres in the pool. The District Court required the dissolution of existing pooling agreements and enjoined any future arrangement of that character.

These provisions of the decree will stand. The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.

There was another type of business arrangement that the District Court found to have the same effect as the

[8] A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet.

pooling agreements just mentioned. Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent.[9] The result is, according to the District Court, that the theatres are operated "collectively, rather than competitively." And where the joint owners are an exhibitor-defendant and an independent the effect is, according to the District Court, the elimination by the exhibitor-defendant of "putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." The District Court found these joint ownerships of theatres to be unreasonable restraints of trade within the meaning of the Sherman Act.

The District Court ordered the exhibitor-defendants to disaffiliate by terminating their joint ownership of the-

[9] *Theatres jointly owned with independents:*

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1287

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214

Of the 1287 jointly owned with independents, 209 would not be affected by the decree since one of the ownership interests is less than 5 per cent, an amount which the District Court treated as *de minimis.*

atres; and it enjoined future acquisitions of such interests. One is authorized to buy out the other if it shows to the satisfaction of the District Court and that court first finds that such acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." This dissolution and prohibition of joint ownership as between exhibitor-defendants was plainly warranted. To the extent that they have joint interests in the outlets for their films each in practical effect grants the other a priority for the exhibition of its films. For in this situation, as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

The District Court also ordered disaffiliation in those instances where theatres were jointly owned by an exhibitor-defendant and an independent, and where the interest of the exhibitor-defendant was "greater than five per cent unless such interest shall be ninety-five per cent or more," an independent being defined for this part of the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." The exhibitor-defendants are authorized to acquire existing interests of the independents in these theatres if they establish, and if the District Court first finds, that the acquisition "will not unduly restrain competition in the

exhibition of feature motion pictures." All other acquisitions of such joint interests were enjoined.

This phase of the decree is strenuously attacked. We are asked to eliminate it for lack of findings to support it. The argument is that the findings show no more than the existence of joint ownership of theatres by exhibitor-defendants and independents. The statement by the District Court that the joint ownership eliminates "putative competition" is said to be a mere conclusion without evidentiary support. For it is said that the facts of the record show that many of the instances of joint ownership with an independent interest are cases wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. Some are said to be rather fortuitous results of bankruptcies; others are said to be the results of investments by outside interests who have no desire or capacity to operate theatres, and so on.

It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. *United States* v. *Crescent Amusement Co., supra,* p. 189; *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United*

States v. *Crescent Amusement Co., supra,* pp. 189–190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that no monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause.

(4) *Formula Deals, Master Agreements, and Franchises.*

A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross. The District Court found that Paramount and RKO

had made formula deals with independent and affiliated circuits. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit. The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. The District Court found some master agreements [10] open to the same objection. Those are the master agreements that cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leaves other terms to the discretion of the circuit. The District Court enjoined the making or further performance of any formula deal of the type described above. It also enjoined the making or further performance of any master agreement covering the exhibition of features in a number of theatres.

The findings of the District Court in these respects are supported by facts, its conclusion that the formula deals and master agreements constitute restraint of trade is valid, and the relief is proper. The formula deals and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power

[10] See note 4, *supra*.

insofar as it combines the theatres in closed towns with competitive situations. The reasons have been stated in *United States* v. *Griffith, ante,* p. 100, and *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110, and need not be repeated here. It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. See *United States* v. *Crescent Amusement Co., supra,* p. 183.

The District Court also enjoined the making or further performance of any franchise. A franchise is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement. The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors. At least that is the way we read its findings.

Universal and United Artists object to the outlawry of franchise agreements. Universal points out that the charge of illegality of franchises in these cases was restricted to franchises with theatres owned by the major defendants and to franchises with circuits or theatres in a circuit, a circuit being defined in the complaint as a group of more than five theatres controlled by the same person or a group of more than five theatres which combine through a common agent in licensing films. It seems, therefore, that the legality of franchises to other exhibitors (except as to block-booking, a practice to which we will later advert) was not in issue in the litigation. Moreover, the findings on franchises are clouded by the statement of the District Court in the opinion that franchises "necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder." As will be seen hereafter, we eliminate from the decree

the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.

We can see how if franchises were allowed to be used between the exhibitor-defendants each might be able to strengthen its strategic position in the exhibition field and continue the ill effects of the conspiracy which the decree is designed to dissipate. Franchise agreements may have been employed as devices to discriminate against some independents in favor of others. We know from the record that franchise agreements often contained discriminatory clauses operating in favor not only of theatres owned by the defendants but also of the large circuits. But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. The findings do not deal with the issue doubtlessly due to the fact that any system of franchises would necessarily conflict with the system of competitive bidding adopted by the District Court. Hence we set aside the findings on franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

We do not take that course in the case of formula deals and master agreements, for the findings in these instances seem to stand on their own bottom and apparently have no necessary dependency on the provision for competitive bidding.

(5) *Block-Booking.*

Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their

individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corporation* v. *United States,* 309 U. S. 436, 459; *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488, 491; *Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U. S. 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.[11]

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[11] Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it. To remedy the problems created by that practice the District Court included the following provision in its decree:

"To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature."

The court advanced the following as its reason for inclusion of this provision:

"Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome

We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly. lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.[12]

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agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."

We approve this provision of the decree.

[12] The exclusive right granted by the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1, includes no such privilege. It provides, so far as material here, as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof;

It is argued that *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not *per se* illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here.

Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the anti-trust laws receive judicial sanction.

We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

(6) *Discrimination.*

The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films;

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to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

allowing deductions in film rentals if double bills are played; granting moveovers [13] and extended runs; granting road show privileges; [14] allowing overage and underage; [15] granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices because they were thought to be impossible under the system of competitive bidding adopted by the District Court.

These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. See *Interstate Circuit* v. *United States, supra,* p. 231; *United States* v. *Crescent Amusement Co., supra,* pp. 182–183. It will be for the

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[13] A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre.

[14] A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas.

[15] Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another.

District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.

There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Second—Competitive Bidding.

The District Court concluded that the only way competition could be introduced into the existing system of fixed prices, clearances and runs was to require that films be licensed on a competitive bidding basis. Films are to be offered to all exhibitors in each competitive area.[16] The license for the desired run is to be granted to the highest responsible bidder, unless the distributor rejects all offers. The licenses are to be offered and taken theatre by theatre and picture by picture. Licenses to show films in theatres in which the licensor owns directly or indirectly an interest of ninety-five per cent or more are excluded from the requirement for competitive bidding.

Paramount is the only one of the five majors who opposes the competitive bidding system. Columbia Pictures, Universal, and United Artists oppose it. The intervenors representing certain independents oppose it. And

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[16] Competitive bidding is required only in a "competitive area" where it is "desired by the exhibitors." As the District Court said, "the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The details of the competitive bidding system will be found in 70 F. Supp. pp. 73–74.

the Department of Justice, which apparently proposed the system originally, speaks strongly against it here.

At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken.

Each film is to be licensed on a particular run to "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." The bid "shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make." We do not doubt that if a competitive bidding system is adopted all these provisions are necessary. For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash of tobacco, wheat, or other produce. Columbia puts these pertinent queries: "No two exhibitors are likely to make the same bid as to

dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?"

The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well-nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining "a reasonable return to the licensor" would seem necessary.

We mention these matters merely to indicate the character of the job of supervising such a competitive bidding system. It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals, could be done only with the

greatest reluctance. At least such choices should not be faced unless the need for the system is great and its benefits plain.

The system uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause. If a premium is placed on purchasing power, the court-created system may be a powerful factor towards increasing the concentration of economic power in the industry rather than cleansing the competitive system of unwholesome practices. For where the system in operation promises the advantage to the exhibitor who is in the strongest financial position, the injunction against discrimination [17] is apt to hold an empty promise. In this connection it should be noted that, even though the independents in a given competitive area do not want competitive bidding, the exhibitor-defendants can invoke the system.

Our doubts concerning the competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own features. They thus start with an inventory which all other exhib-

[17] The competitive bidding part of the decree provides: "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

itors lack. The latter have no prospect of assured runs except what they get by competitive bidding. The proposed system does not offset in any way the advantages which the exhibitor-defendants have by way of theatre ownership. It would seem in fact to increase them. For the independents are deprived of the stability which flows from established business relationships. Under the proposed system they can get features only if they are the highest responsible bidders. They can no longer depend on their private sources of supply which their ingenuity has created. Those sources, built perhaps on private relationships and representing important items of good will, are banned, even though they are free of any taint of illegality.

The system was designed, as some of the defendants put it, to remedy the difficulty of any theatre to break into or change the existing system of runs and clearances. But we do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strengthen their hold in the industry. We are reluctant to alter decrees in these cases where there is agreement with the District Court on the nature of the violations. *United States* v. *Crescent Amusement Co., supra,* p. 185; *International Salt Co.* v. *United States,* 332 U. S. 392, 400. But the provisions for competitive bidding in these cases promise little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective. They vest powerful control in the exhibitor-defendants over their competitors if close supervision by the court is not undertaken. In light of these considerations we conclude that the competitive

bidding provisions of the decree should be eliminated so that a more effective decree may be fashioned.

We have already indicated in preceding parts of this opinion that this alteration in the decree leaves a hiatus or two which will have to be filled on remand of the cases. We will indicate hereafter another phase of the problem which the District Court should also reconsider in view of this alteration in the decree. But out of an abundance of caution we add this additional word. The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated.

Third. Monopoly, Expansion of Theatre Holdings, Divestiture.

There is a suggestion that the hold the defendants have on the industry is so great that a problem under the First Amendment is raised. Cf. *Associated Press* v. *United States,* 326 U. S. 1. We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted. The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not

what the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.

The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business.

The five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076.[18] Those theatres paid 45 per cent of the total domestic film rental received by all eight defendants.

In the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors. In 4 of those cities the five majors have no theatres. In 38 of those cities there are no independent first-run theatres. In none of the remaining 50 cities did less

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[18] The theatres which each of the five majors owned independently of the others were: Paramount 1,395 or 7.72 per cent; Warner 501 or 2.77 per cent; Loew's 135 or .74 per cent; Fox 636 or 3.52 per cent; RKO 109 or .60 per cent. There were in addition 361 theatres or about 2 per cent in which two or more of the five majors had joint interests. These figures exclude connections through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

These theatres are located in 922 towns in 48 States and the District of Columbia. For further description of the distribution of theatres see Bertrand, Evans, and Blanchard, The Motion Picture Industry—A Pattern of Control 15–16 (TNEC Monograph 43, 1941).

than three of the distributor-defendants license their product on first run to theatres of the five majors. In 19 of the 50 cities less than three of the distributor-defendants licensed their product on first run to independent theatres. In a majority of the 50 cities the greater share of all of the features of defendants were licensed for first-run exhibition in the theatres of the five majors.

In about 60 per cent of the 92 cities having populations of over 100,000, independent theatres compete with those of the five majors in first-run exhibition. In about 91 per cent of the 92 cities there is competition between independent theatres and the theatres of the five majors or between theatres of the five majors themselves for first-run exhibition. In all of the 92 cities there is always competition in some run even where there is no competition in first runs.

In cities between 25,000 and 100,000 populations the five majors have interests in 577 of a total of 978 first-run theatres or about 60 per cent. In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town.

The District Court held that the five majors could not be treated collectively so as to establish claims of general monopolization in exhibition. It found that none of them was organized or had been maintained "for the purpose of achieving a national monopoly" in exhibition. It found that the five majors by their present theatre holdings "alone" (which aggregate a little more than one-sixth of all the theatres in the United States), "do not and cannot collectively or individually, have a monopoly of exhibition." The District Court also found that where a single defendant owns all of the first-run theatres in a town, there is no sufficient proof that the acquisition was for the purpose of creating a monopoly. It found rather that such consequence resulted from the inertness

of competitors, their lack of financial ability to build theatres comparable to those of the five majors, or the preference of the public for the best-equipped theatres. And the percentage of features on the market which any of the five majors could play in its own theatres was found to be relatively small and in nowise to approximate a monopoly of film exhibition.[19]

Even in respect of the theatres jointly owned or jointly operated by the defendants with each other or with independents, the District Court found no monopoly or attempt to monopolize. Those joint agreements or ownership were found only to be unreasonable restraints of trade. The District Court, indeed, found no monopoly on any phase of the cases, although it did find an attempt to monopolize in the fixing of prices, the granting of un-

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[19] The number of feature films released during the 1943–44 season by the eleven largest distributors is as follows:

	No. of Films	*Percentages of Total*	
		With "Westerns" included	*With "Westerns" excluded*
Fox	33	8.31	9.85
Loew's	33	8.31	9.85
Paramount	31	7.81	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.32	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Republic	–29 features –30 "Westerns"	14.86	8.66
Monogram	–26 features –16 "Westerns"	10.58	7.76
PRC	–20 features –16 "Westerns"	9.07	5.97
Totals	397 335 without "Westerns"	100.00	100.00

reasonable clearances, block-booking and the other unlawful restraints of trade we have already discussed. The "root of the difficulties," according to the District Court, lay not in theatre ownership but in those unlawful practices.

The District Court did, however, enjoin the five majors from expanding their present theatre holdings in any manner.[20] It refused to grant the request of the Department of Justice for total divestiture by the five majors of their theatre holdings. It found that total divestiture would be injurious to the five majors and damaging to the public. Its thought on the latter score was that the new set of theatre owners who would take the place of the five majors would be unlikely for some years to give the public as good service as those they supplanted "in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres." Divestiture was, it thought, too harsh a remedy where there was available the alternative of competitive bidding. It accordingly concluded that divestiture was unnecessary "at least until the efficiency of that system has been tried and found wanting."

It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, *i. e.* it was designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices,

[20] Excepted from this prohibition was the acquisition of interests in theatres jointly owned, a matter we have discussed in a preceding portion of this opinion.

the second-run theatres the next highest, and so on. As the District Court found, "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible."

It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five majors through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly.

An example will illustrate the problem. In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States* v. *Griffith, ante,* p. 100, and see *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110, even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy

of restitution. What findings would be warranted after such an inquiry in the present cases, we do not know. For the findings of the District Court do not cover this point beyond stating that monopoly was an objective of the several restraints of trade that stand condemned.

Moreover, the problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. That is the position we have taken in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. 110, in dealing with a projection of the same conspiracy through certain large circuits. Parity of treatment of the unaffiliated and the affiliated circuits requires the same approach here. For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors.

The findings of the District Court are deficient on that score and obscure on another. The District Court in its findings speaks of the absence of a "purpose" on the part of any of the five majors to achieve a "national monopoly" in the exhibition of motion pictures. First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the

exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of "any part" of trade or commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225. Second, we pointed out in *United States* v. *Griffith, ante,* p. 100, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of "purpose" the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States* v. *Griffith, ante,* p. 100), for as we stated in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, 811, the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question.

Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibit-

ing motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 269–270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in *United States* v. *Griffith*, *ante*, p. 100, 107, n. 10, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See *United States* v. *Swift & Co.*, 286 U. S. 106, 116; *United States* v. *Aluminum Co. of America*, *supra*, p. 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (*United States* v. *Aluminum Co. of America*, *supra*, p. 430), and the leverage on the market which the particular vertical integration creates or makes possible.

These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing

that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand.

It follows that the provision of the decree barring the five majors from further theatre expansion should likewise be eliminated. For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem. We in no way intimate, however, that the District Court erred in prohibiting further theatre expansion by the five majors.

The Department of Justice maintains that if total divestiture is denied, licensing of films among the five majors should be barred. As a permanent requirement it would seem to be only an indirect way of forcing divestiture. For the findings reveal that the five majors could not operate their theatres full time on their own films.[21] Whether that step would, in absence of competitive bidding, serve as a short-range remedy in certain situations to dissipate the effects of the conspiracy (*United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *United States* v. *Bausch & Lomb Co., supra,* p. 724; *United States* v. *Crescent Amusement Co., supra,* p. 188) is a question for the District Court.

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[21] The District Court found, "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor."

Fourth.

The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs "with rare efficiency." But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.

We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court.

Fifth—Intervention.

Certain associations of exhibitors and a number of independent exhibitors, appellant-intervenors in Nos. 85 and 86, were denied leave to intervene in the District

Court. They appeal from those orders. They also filed original motions for leave to intervene in this Court. We postponed consideration of the original motions and of our jurisdiction to hear the appeals until a hearing on the merits of the cases.

Rule 24 (a) of the Rules of Civil Procedure, which provides for intervention as of right, reads in part as follows: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these anti-trust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. *United States* v. *St. Louis Terminal,* 236 U. S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the anti-trust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency proposed the idea of competitive bidding in the District Court.

We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their

position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed.. Now that the provisions for competitive bidding have been eliminated from the decree, there is no basis for saying that the decree affects their legal rights. Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared.

The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, dissenting in part.

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." On this guiding consideration, the Court earlier this Term sustained a Sherman Law decree, which was not the outcome of a long trial involving complicated and contested facts and their significance, but the formulation of a summary judgment on the bare bones of pleadings. *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401. The record in this case bespeaks more compelling respect for the decree fashioned by the District Court of three judges to put an end to violations of the Sherman Law and to prevent the recurrence, than that which led this Court not to find abuse of discretion in the decree by a single district judge in the *International Salt* case.

This Court has both the authority and duty to consider whether a decree is well calculated to undo, as far as is possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition. But it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Law cases. It could not be fairly claimed that this Court possesses greater experience, understanding and prophetic insight in relation to the movie industry, and is therefore better equipped to formulate a decree for the movie industry than was the District Court in this case, presided over as it was by one of the wisest of judges.

The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measurable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

The crucial legal question before us is not whether we would have drawn the decree as the District Court drew it, but whether, on the basis of what came before the District Court, we can say that in fashioning remedies it did not fairly respond to disclosed violations and therefore abused a discretion, the fair exercise of which we should respect and not treat as an abuse. Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of

its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout purpose on the part of that court to enforce its thoroughgoing understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors.

How did the District Court go about working out the terms of the decree some of which this Court now displaces? The case was before that court from October 8, 1945, to January 22, 1947. A vast body of the evidence which had to be considered below, and must be considered here in overturning the lower court's decree, consisted of documents. A mere enumeration of these documents, not printed in the record before us, required a pamphlet of 42 pages. It took 460 pages for a selection of exhibits deemed appropriate for printing by the Government. The printed record in this Court consists of 3,841 pages. It is on the basis of this vast mass of evidence that the District Court, on June 11, 1946, filed its careful opinion, approved here, as to the substantive issues. Thereafter, it heard argument for three days as to the terms of the judgment. The parties then submitted their proposals for findings of fact and conclusions of law by the District Court. After a long trial, an elaborate opinion on the merits, full discussion as to the terms of the decree, more than two months for the gestation of the decree, the terms were finally promulgated.

I cannot bring myself to conclude that the product of such a painstaking process of adjudication as to a decree appropriate for such a complicated situation as this record discloses was an abuse of discretion, arrived at as it was after due absorption of all the light that

could be shed upon remedies appropriate for the future. After all, as to such remedies there is no test, ultimately, except the wisdom of men judged by events.

Accordingly, I would affirm the decree except as to one particular, that regarding an arbitration system for controversies that may arise under the decree. This raises a pure question of law and not a judgment based upon facts and their significance, as are those features of the decree which the Court sets aside. The District Court indicated that "in view of its demonstrated usefulness" such an arbitration system was desirable to aid in the enforcement of the decree. The District Court, however, deemed itself powerless to continue an arbitration system without the consent of the parties. I do not find such want of power in the District Court to select this means of enforcing the decree most effectively, with the least friction and by the most fruitful methods. A decree as detailed and as complicated as is necessary to fit a situation like the one before us is bound, even under the best of circumstances, to raise controversies involving conflicting claims as to facts and their meaning. A court could certainly appoint a master to deal with questions arising under the decree. I do not appreciate why a proved system of arbitration, appropriate as experience has found it to be appropriate for adjudicating numberless questions that arise under such a decree, is not to be treated in effect as a standing master for purposes of this decree. See *Ex parte Peterson,* 253 U. S. 300. I would therefore leave it to the discretion of the District Court to determine whether such a system is not available as an instrument of auxiliary enforcement. With this exception I would affirm the decree of the District Court.

SCHWABACHER ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 258. Argued January 6–7, 1948.—Decided May 3, 1948.

1. The Interstate Commerce Commission, under § 5 of the Interstate Commerce Act as amended, approved and authorized a voluntary merger of two railroad companies into one corporation. The Commission found that the public interest would be served by the merger and unification of their properties and operations and that the plan as a whole, and as applied to each group of shareholders, was just and reasonable; but it disclaimed jurisdiction to pass upon the claims of dissenting stockholders who owned a small percentage of one class of stock of one of the companies and who had intervened and claimed that the terms of the merger deprived them of charter rights under the law of the State of incorporation of their company. The Commission considered that the amount involved in the claims of the dissenting stockholders, however settled, was not sufficient to affect the solvency of the new company or jeopardize its operations. *Held:* The Commission was not free to renounce or delegate its power to settle finally the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity. Pp. 184–202.
2. The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority. P. 197.
3. The Commission may not leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the new company, contingent upon the decision of some other tribunal or agreement of the parties themselves, but must pass upon and approve all capital liabilities which the merged company will assume and discharge as a result of the merger. Pp. 197–198.
4. The Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. P. 198.
5. The rights of shareholders of railroads merging voluntarily under the Interstate Commerce Act are governed by federal, not state,

law; and, apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable. Pp. 198–199.

6. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a corporate charter made to him but the current worth of that promise that governs; it is not what he once put into a eonstituent company but what value he is contributing to the merger that is to be made good. P. 199.
7. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. P. 200.
8. When stockholders are given what it is just and reasonable they should have, the Interstate Commerce Act does not permit state law to impose greater obligations on the financial structure of the merging railroads with consequent increased calls upon their assets or earning capacity. P. 201.
9. No rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. P. 201.

72 F. Supp. 560, reversed.

A suit to set aside an order of the Interstate Commerce Commission approving and authorizing a voluntary merger of two railroads was dismissed by a District Court of three judges. 72 F. Supp. 560. A direct appeal was taken to this Court. *Reversed and remanded,* p. 202.

Carl McFarland argued the cause for appellants. With him on the brief were *T. W. Dahlquist, Ashley Sellers* and *Stephen J. Angland.*

Daniel H. Kunkel argued the cause for the Interstate Commerce Commission, appellee. With him on the brief was *Daniel W. Knowlton.*

George D. Gibson argued the cause for the Chesapeake & Ohio Railway Co. et al., appellees. With him on the brief were *R. W. Purcell, John C. Shields, George H. Gardner* and *John W. Riely.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy grows out of the voluntary merger of Chesapeake & Ohio Railway Company and Pere Marquette Railway Company, which companies, together with Alleghany Corporation, sought approval by the Interstate Commerce Commission. Pere Marquette is incorporated under the laws of Michigan, while Chesapeake & Ohio is chartered by Virginia. Chesapeake & Ohio acquired and for some years exercised active control of Pere Marquette, whose properties and operations complement rather than compete with those of Chesapeake & Ohio. Late in 1945 merger proceedings were commenced under enabling statutes of the two states and were consummated with approval of considerably more than the number of shares made necessary by statutes of the respective states. The Interstate Commerce Commission found, and there is no attack upon the findings, that the public interest is served by merger and unification of these properties and operations. The Commission also concluded that the plan as a whole, and as applied to each group of shareholders, is just and reasonable, and there is no attack upon this conclusion except that by the appellants which is treated fully herein. Consequently, details of the plan are of little importance to this litigation.

Appellants are owners of 2,100 shares of $100 par 5% cumulative preferred stock of Pere Marquette. Their interests aggregate a little less than 2% of the outstanding stock of this class. Dividends on this stock have been unpaid since 1931 and, as of the commencement of this

controversy, were in arrears in the sum of $72.50 per share, an amount that is increasing with time. The Pere Marquette charter provides for full payment of the stock at par, plus accrued unpaid dividends, "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary . . . before any amounts are paid to holders of the . . . common stock." The appellants contend that the merger hereinafter described terminates the corporate existence and, under this clause as construed by Michigan law, amounts to a "winding up." They insist that since the merger makes provision for some compensation to common stockholders these appellants have the right, under Michigan law, to have their shares recognized on the basis of at least $172.50 each. The Commission found the market value per share ranged, at different times, from $87 to $99, while the merger terms give stocks in exchange which would have realized about $90 and $111 per share on the same dates. Appellants dissented from the merger, but Michigan law provides no specific right or procedure for appraisal and retirement of the holdings of a stockholder dissenting from a railroad merger.

When application was filed with the Interstate Commerce Commission under § 5 of the Interstate Commerce Act as amended (49 U. S. C. § 5), for approval and authorization of the merger,[1] as well as for other relief,

[1] Section 5 as amended provides in part as follows:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership . . .

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part

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appellants intervened and asked that body to determine, recognize and protect their asserted right to the full legal liquidation figure. The Commission approved the merger and the merger terms, finding them just and

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of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants . . . and shall afford reasonable opportunity for interested parties to be heard. . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect . . . upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory . . .; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. . . .

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. . . .

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof . . .

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry

reasonable as to each class of stockholders. However, it disclaimed jurisdiction to pass upon the further claims of the appellants asserted on the basis of their interpretation of Michigan law. It reviewed at some length the economic position of the stock. It recited that these shares had received no dividends since 1931 and that appellants' witnesses agreed that these stockholders could not expect to receive any dividends for many years, apart from the merger. The Commission also pointed out the deficit in operations of Pere Marquette for the first quarter of 1946 as contrasted with the net income of Chesapeake and Ohio, and concluded that "On the whole, it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their company into the Chesapeake & Ohio." The Commission did not question that the stockholders, on liquidation, dissolution or winding up of Pere Marquette, would be entitled to be paid in full the par value of their shares and accumulated dividends before any payment to holders of common stock. It did not undertake to deter-

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such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

mine the ultimate worth of these stocks in case of an actual liquidation, but it considered their present intrinsic value on a capitalized earnings basis, an actual yield basis, and its present market position and concluded: "Accordingly, considering Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable."

The Commission then noted the contention of the appellants that as to them the terms were not just and reasonable, because they are deprived of contract rights under Michigan law, which they have not waived. It is contended that the Commission should not remit the dissenting stockholders to remedies in state courts as the Commission would thereby decline the jurisdiction conferred by § 5 and § 20a of the Act.[2] But the Commission considered that it was entrusted with authority to decide the public interest aspects of the merger of these transportation facilities and that it could not be expected to enter into the question of "compensation of dissenting stockholders on specified bases" before approval and merger. It thought that, having found the treatment of each class to be just and reasonable, it had done its full duty "when we make certain that all stockholders of the same class are to be treated alike." It declined to decide the Michigan law question as to what the rights of dissenting stockholders were, and whether the merger was equivalent to a liquidation, but said: "This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

[2] For pertinent provisions of § 5 and § 20a see notes 1 and 15 respectively.

Taking into account the small percentage of the dissenting shares, the current assets position of the Chesapeake & Ohio, and the maximum possible cost to the merged company of the settlement of these claims on the basis most favorable to appellants, it considered that the company was amply able to bear "any probable expenditure of cash that it might be required to make in connection with the merger. Accordingly, it appears that consummation of the merger will not involve a burden of excessive expenditure." The Commission thus left in a state of suspense, subject to further litigation or negotiation, these claims concerning the extent of the capital obligations of a constituent company, after examining them sufficiently to determine only that, however settled, they did not involve enough to affect the solvency of the new company or jeopardize its operations.

The Commission denied appellants' petition for rehearing and they filed suit in the United States District Court for the Eastern District of Virginia to set aside the order authorizing the merger. A court of three judges, convened as required by law,[3] sustained the Commission, 72 F. Supp. 560. Appellants bring to us[4] the question whether the Commission, in view of its authority over mergers, which is declared to be exclusive and plenary, could decline to determine just what the dissenting stockholders' legal rights were under the Michigan law and the Pere Marquette charter, and to recognize them in full by the terms of the merger.

The disposition of appellants' claims, as well as the nature of the claims themselves, requires consideration of the relative function and authority of federal and state law in regulating and approving voluntary railroad mergers. The appellants contend that their share in the merged company is to be measured by, or their remedies

[3] 28 U. S. C. § 47.

[4] 28 U. S. C. § 47 (a); 28 U. S. C. § 345.

as dissenters are to be found in, state law, but that the federal agency is bound to determine and apply that law. The Commission on the other hand refuses either finally to foreclose or to allow these claims. It apparently leaves it open to the state courts, or to the parties by negotiation, to add to the surviving carrier's capital obligations, which the Commission has found to be just and reasonable, others founded only in state law and as to which it has made no such findings. We conclude that neither position is wholly consistent with the federal statutory plan for authorization and approval of mergers.

It is not for us to adjudicate the existence or the measure of any rights that Michigan law may confer upon dissenting stockholders. Neither the Commission nor this Court can make a plenary and exclusive decision as to what the law of a state may be, for the function of declaring and interpreting its own law is left to each state of the Union. But the effect of the state law in relation to a constitutional Act of Congress, in view of the constitutional provision that the latter shall be "the supreme law of the land," "laws of any state to the contrary notwithstanding," is for us to determine. Our first inquiry here, therefore, is whether the Interstate Commerce Act accords recognition to those state law rights, if any exist. To determine this federal question we assume, but do not decide, that Michigan law would consider this merger to be a liquidation, and would regard the recognition given to the common stock as entitling these dissenters to "full payment" in cash or its equivalent for both the par value of their preferred shares and accrued unpaid dividends thereon. Assuming such to be their rights under the law of the State, we must decide whether approval of a railroad merger under the Transportation Act of 1940 [5] is conditioned upon observance of

[5] Act of September 18, 1940, 54 Stat. 898.

such state law rights or can be made by the Commission contingently subject to them. A résumé of the history of that Act throws light on the problem dealt with by that legislation.

The basic railroad facilities of the United States were constructed under state authorization and restrictions by corporations whose powers and limitations were prescribed by state legislatures, or resulted from limitations on the states themselves. Construction in reference primarily to local or regional transportation needs created duplicating and competing facilities in some areas and provided inadequate ones in others. Expansion necessary to serve advancing national frontiers was stimulated by extensive subsidies from the Federal Government, largely in the form of land grants. But the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.

The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920.[6] In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy [7] to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the

[6] Act of February 28, 1920, 41 Stat. 456.

[7] "It is manifest . . . that the act made a new departure. . . ." Chief Justice Taft, in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585.

interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331; *Texas & Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266.[8]

As a means to this end, the 1920 Act required[9] the Commission to prepare and adopt a plan for nation-wide consolidations of the railway properties of the country. It made this master plan the governing consideration in approving voluntary consolidations of railroads

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[8] In *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478, in referring to the *Wisconsin* case, 257 U. S. 563, and the *New England Divisions Case*, 261 U. S. 184, the late Chief Justice said: "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

[9] § 407 (4).

which were permitted only if in harmony with and in furtherance of the Commission's over-all plans.[10] If they met that test, Congress provided that mergers could be consummated notwithstanding any restraint or prohibition by state authority.[11]

By 1940 it had become apparent that the ambitious nation-wide plan of consolidation was not bearing fruit. Various studies and investigations [12] led to the conclusion that it was a case where the best was an enemy of the good, and waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nation-wide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness, in which case they should become effective regardless of state authority.[13] The Act does not specify every consideration to which the Commission must give weight in determining whether or not any plan meets the tests. Section 5 (2) provides only that, "among others," the Commission shall consider the effect upon adequate transportation service, the effect of inclusion or failure to include other railroads, total fixed charges, and the interests of the carrier employees affected. This Court has recently and unanimously said in reference to this Act, "Congress has

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[10] § 407 (6) (a).

[11] § 407 (8).

[12] See, for example, report and recommendations by the President's Committee of Six, appointed September 20, 1938, whose report dated December 23, 1938, is considered part of the legislative history of the Transportation Act of 1940.

[13] See note 1, *supra*.

long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118.[14]

So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5 (2) (b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5 (2) (b).) Third, assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote." (§ 5 (11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and

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[14] The Act itself included a statement of the "National Transportation Policy" in these terms: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

the parties are relieved of "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." (§ 5 (11).)

The Commission, under this Act as well as the Act of 1920, was also given complete control of the capital structure to result from a merger.[15] The carrier, even if per-

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[15] Repeated recommendations of the Commission that the federal government occupy the field of regulation of railroad security issues and assumption of obligations were followed in 1920 by addition of § 20a to the Interstate Commerce Act (§ 439 of the Transportation Act of 1920, 41 Stat. 494).

As early as 1907 the Commission had stated that "the time has come when some reasonable regulation should be imposed upon the issuance of securities by railways engaged in interstate commerce." 12 I. C. C. 277, 306. This recommendation was renewed in the Commission's annual report for 1907, p. 24, and in every succeeding annual report up to and including 1919. The Commission incorporated in the 1919 report the statement concerning recommended legislation it had submitted to the Senate Interstate Commerce Committee, which included a recommendation for regulation of security issues.

House Report No. 456, 66th Cong., 1st Sess. (November 10, 1919), said with respect to the section which later became § 20a: ". . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action."

Section 20a as enacted in 1920 remained unchanged by the Transportation Act of 1940 and provides in part as follows:

"(2) . . . it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier cor-

mitted by state law which created it, may issue no stock, bond or evidence of indebtedness without approval. It may assume no obligation in respect of the securities of another person or corporation except with approval. And the approval is to be given only on a finding that it "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably neces-

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poration, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . .

"(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. . . ."

sary and appropriate for such purpose." 49 U. S. C. § 20a (2).

The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority. § 5 (11);[16] § 20a (7).[17]

The Commission, as we have seen, has found that the liabilities asserted by appellants, if settled by litigation or negotiation, will not impair the carrier's ability to perform its service, but it has not found the assumption of such liabilities to be compatible with the public interest under § 5 and § 20a. Indeed, since these claims exceed what the Commission has found to be just and reasonable, it could hardly find that assumption of such claims would be compatible with the public interest.

It appears to us inconsistent with the Interstate Commerce Act[18] for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think

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[16] For text of § 5 (11) see note 1.

[17] For text of § 20a (7) see note 15.

[18] In an early case (*Pittsburgh & W. Va. R. Co.* v. *Interstate Commerce Commission,* 54 App. D. C. 34, 293 F. 1001, appeal dismissed 266 U. S. 640) in which the constitutionality of § 20a had been upheld, the Court said: "If 'a fair return on capital devoted to the transportation service' [*New England Divisions Case,* 261 U. S. 184, 189] was to be insured the railway companies, and at the same time proper service and equitable rates accorded the public, the supervision of the issuance of stock, the incurring of bonded indebtedness, the extension and consolidation of railway lines, becomes of the utmost importance. Without this power to supervise the issue of stock and bonds, and thus limit the dividend and interest obligations of the carriers, as well as the expenditures in extensions and improvements, the fixing of adequate rates to insure a just return to the carrier, and at the same time equitable protection to the public, would be impossible. . . ."

that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger. If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company. It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. It is also in the public interest that no capitalization or indebtedness be carried over except that which meets the test of the Act in all other respects. We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain. Indeed, the very fact on which appellants rely heavily, that the Commission's jurisdiction is "plenary" and "exclusive," argues with equal force that federal law is also plenary and exclusive. The Commission likely would not and probably could not be given plenary and exclusive jurisdiction to interpret and apply any state's law. Whatever rights the appellants ask the Commission to assure must be founded on federal, not on state, law.

Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just

and reasonable. These terms would be largely meaningless to the stockholders if their interests were ultimately to be settled by reference to provisions of corporate charters and of state laws. Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces. *Cf. Market Street R. Co.* v. *Commission,* 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.

In construing the words "fair and equitable" in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued "on the basis of a going business and not as though a liquidation were taking place." Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable. *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624.

The appellants here, although the enterprise is to continue, insist on a valuation according to the letter of the charter. By this method the longer their stock is in default of dividends or earnings, the greater interest it

would have in the merged properties if the common stock was to be recognized at all. The Commission, however, did not consider that a long-continued default and the prospect of further default added greatly to the present intrinsic or market value of the stock in exchange. Its measuring rod was an economic rather than a legalistic one. The Commission considered the stock's past yield, present market value, and future prospects. It found that, all things considered, the merger terms gave to these appellants in new stock the fair economic equivalent of what they already held. It considered the deal just and reasonable on an exchange basis for a continuing enterprise. But it did not undertake to say whether, under the letter of their charter as construed under the law of Michigan, the preferred stockholders may not have a contract that would exact more than an economic equivalent.

Since the federal law clearly contemplates merger as a step in continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. Federal law requires that merger terms be just and reasonable to all groups of stockholders, in contemplation of the continued use of their capital in the public calling to which it has been dedicated. Congress has made no provision by which minority stockholders, dissatisfied with a proposed railroad merger, may block it or compel retirement of their capital, as statutes often permit to be done in the case of private corporations where the public interest is not much concerned with its effect on the enterprise. And since Congress dealt with the subject of stockholders' consent, its failure to provide for withdrawal of non-

consenting capital cannot be considered an oversight to be supplied by us. A part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval. It must submit to regulations and to readjustments in the public interest on just and reasonable terms.

In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders. The Commission indicates both awareness and discharge of this duty in this case. Its finding that this plan is just and reasonable is not challenged here except on the basis of Michigan law. When stockholders are given what it is just and reasonable they should have, the Interstate Commerce Act does not permit state law to impose greater obligations on the financial structure of the merging railroads with consequent increased calls upon their assets or earning capacity.

We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have

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some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed.

Reversed and remanded.

MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

The railroads of this country are operated by not less than 693 corporations. These exist by virtue of charters granted by the several States,[1] the laws of which govern their internal affairs, and, more particularly, the rights and liabilities of their stockholders. The Chesapeake & Ohio is chartered by Virginia, the Pere Marquette by Michigan. The laws of Virginia and Michigan respectively determine the conditions under which each may combine with other corporations. The votes of sufficient stockholders of these two corporations to satisfy the laws of their respective States were in favor of a voluntary agreement for the absorption of the Pere Marquette by the Chesapeake & Ohio. To consummate this agreement, however, required the authorization of the Interstate Commerce Commission under the terms of § 5 (2) of the Interstate Commerce Act, as amended by the

[1] According to the annual reports of Class I and Class II carriers on file with the Interstate Commerce Commission there is at present only one operating carrier chartered by Congress: the Texas and Pacific Railway. See the Act of March 3, 1871, 16 Stat. 573, as amended by the Act of February 9, 1923, 42 Stat. 1223.

Transportation Act of 1940. The agreement provided, in short, that the total outstanding securities of the Pere Marquette, amounting to 450,460 shares of common, 124,290 of cumulative preferred, and 112,000 of prior preference, were to be exchanged for 211,429.4 shares of Chesapeake & Ohio common and 312,272.2 preferred. All but 9% of the security holders of the Pere Marquette cumulative preferred assented to this arrangement. The appellants, holding less than 2% of that class of stock, stood on their rights under Michigan law, claiming that they were entitled to the dividends unpaid since 1931, amounting to $72.50 per share.

The Interstate Commerce Commission approved the proposed merger but refused to pass on the legal claims thus asserted under Michigan law by the appellants. The Commission ruled that it was not called upon to pass upon individual rights against a merged road when the potential recognition of such rights, under appropriate State law, could not affect the public interest which it is requisite for the Commission to safeguard before authorizing a merger. For the Commission held that, even if the appellants' claims were sustained by Michigan law, the amount involved would in nowise affect either the security structure or the cash position of the Chesapeake & Ohio.

The Chesapeake & Ohio is capitalized at $191,433,919. An additional $28,949,745 of stock is to be issued, under the merger plan, for Pere Marquette shareholders, making a total capitalization for the Chesapeake & Ohio, after merger, of $220,383,595. The appellants own 2,100 shares of Pere Marquette cumulative preferred. The merger agreement offered them securities found by the Commission to be worth $111.60 per share, or $234,360. If their claim for full book value of $172.50 per share were honored, it would amount to $362,250. This contingent liability of $127,890, the Commission concluded, did not

affect its finding as to the soundness, from the point of view of the "public interest," of the financial structure devised and approved for this merger. The Commission further pointed out that even if 2% of each class of Pere Marquette stock—the maximum number contemplated by the agreement—were to refuse to participate, the difference between the value of the Chesapeake & Ohio shares offered to them and the book value of their Pere Marquette shares could, if required, readily be absorbed by a soundly based quarter-billion-dollar carrier.

Both the Chesapeake & Ohio and the Interstate Commerce Commission here urge this view of the law. The Court, however, reads the Commission's duty under the Act quite differently, although in reaching its conclusion the Commission applied its settled administrative practice.

I think that the Commission was right in the view it took of its powers and duties. Even if the matter were doubtful, the Court does not seem to me to give to the Commission's construction of the Act the weight to be accorded its experienced judgment, which we held in *United States* v. *American Trucking Associations,* 310 U. S. 534, 549, to be required. Since the Commission disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction.

Until the Transportation Act of 1920, carriers, while subject to the Sherman law, could combine without leave of the Interstate Commerce Commission. See *Northern Securities Co.* v. *United States,* 193 U. S. 197. The Transportation Act of 1920 required the authorization of the Commission for acquisition by one carrier of the control over another, to the extent defined by § 5 of the Interstate Commerce Act, as amended. By the Transportation Act of 1940, the voluntary merger of the properties of two or more carriers into one corporation was

sanctioned, subject, however, to the scrutiny of the Interstate Commerce Commission for the due protection of the "public interest." Congress defined with particularity the factors that constituted the "public interest" put into the Commission's keeping.

The Court now holds that State law governing the relations between State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger, even when the Commission finds that to leave the adjudication of those rights to the law that created them in nowise touches the "public interest" that is the sole condition to carrying out a wholly voluntary arrangement, and even though such a voluntary arrangement by itself could not affect the rights of dissenters. I have no doubt that Congress could compel the unification of railroad properties theretofore in separate ownership and in so doing override State-created legal rights of stockholders of the constituent carriers. In the case of financially embarrassed carriers, Congress, in the exercise of its bankruptcy powers, has empowered the Interstate Commerce Commission to formulate plans of reorganization, the terms of which, if fair and equitable, may override State-created legal rights of stockholders who do not assent. In the interests of a more efficient national railroad system, Congress may accomplish like results under the Commerce Clause. But that is precisely what Congress has refused to do. It was besought to eliminate the waste and inefficiencies due to the congeries of corporate instrumentalities through which the railroads of the United States operate, by providing for compulsory consolidations. It was also besought to do away with the complexities and confusion resulting from State corporations conducting the country's interstate railroad business, by requiring federal incorporation. Congress rejected both demands. See H. R. Rep. No. 650, 66th Cong., 2d Sess., pp. 63–64. It

left mergers of separate railroad properties into larger units to the will of their private owners, merely lodging a veto power in the Commission if such voluntary mergers run counter to the defined public interest. And Congress explicitly negatived the possibility of construing such supervision by the Commission as the creation, "directly or indirectly, of a Federal corporation."

The Commission was charged with seeing to it that the very limited requirements of § 5 (2) were observed, and to that end was given "exclusive and plenary" authority. § 5 (11). The purpose was to authorize a voluntary arrangement, to sanction an agreement, not to formulate a plan and to coerce its adoption, as is true of § 77. The law specifically enumerates the requirements that constitute the "public interest" which the voluntary agreement must satisfy to secure the Commission's approval. These are: the effect of the proposal on the public transportation service; the effect of including or failing to include other railroads in the plan; the resulting fixed charges; and the interest of the carrier employees affected. These factors have no bearing on whether the appellants' claim should be allowed. The great difference between these requirements and the detailed and comprehensive provisions of § 77, 11 U. S. C. § 205, carries a sharp legal contrast between the authorization which Congress required for voluntary mergers and the coercion of an imposed plan of reorganization in the case of insolvent roads.

Appropriate accommodation between federal and State interests in the construction of the Interstate Commerce Act is needlessly sacrificed by adding, to the detailed provisions whereby the Commission is merely authorized to approve voluntary mergers, an implied abrogation of State law in no respect inconsistent with such limited power of authorization, since the Commission found that survival of a claim under State law would not impinge

upon "the public interest." It ignores the salutary principle of construction, so strikingly illustrated by the *Los Angeles Terminal Cases* from which it was drawn, "that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." *Atchison, Topeka & Santa Fe R. Co.* v. *Railroad Commission,* 283 U. S. 380, 392–93. See also *Palmer* v. *Massachusetts,* 308 U. S. 79.

Since it is needless, it is undesirable to draw an implication so destructive of State law from the Congressional scheme for allowing voluntary mergers. In fact, Congress has manifested not an intention to abrogate State law where the Commission finds no collision with the public interest; it has manifested an intention not to abrogate State law unless it interferes with carrying out an approved merger. Thus, it made the necessary proportion of assenting stockholders dependent on State law. It hardly seems congruous to provide that State law should determine when the opposition of stockholders may prevent a voluntary merger, but should have no effect on the rights which such dissenters have under State law, even where the Interstate Commerce Commission finds no national interest involved in determining and enforcing such rights. Again, while § 5 (11) relieves parties to an approved merger from the restraints of other laws, "Federal, State, or municipal," it does so only "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." This paragraph further contains an expressed disclaimer of authorization of federal incorporation. The prohibition of federal incorporation surely implied a desire to retain to the fullest possible extent the

ties between the States and their chartered corporations. One of the vital consequences of incorporation in a given State is the subjection of the relationship between stockholders and their corporation to the law of that State except insofar as federal law unmistakably overrides it.

The considerations relevant to voluntary railroad mergers sharply differ from those that control liquidations and reorganizations under § 77 of the Bankruptcy Act. (See also Railroad Reorganization Act of 1948, 62 Stat. 162.) A railroad in reorganization is administered by a bankruptcy court which has control of all its assets. The power of dealing with all claims is inevitably concentrated in that court. In merger proceedings, however, there is no obstacle to the practice pursued by the Commission of deciding what is "just and reasonable" and in "the public interest" as to each class of securities, while at the same time permitting any dissenter to stand on the terms of the particular stock issue, leaving to State law to determine what those terms are, provided only that the function of the new corporation, as part of an economic and efficient national railroad system, would not be affected by allowance of such claims. The Commission has here ruled that the appellants assert an unliquidated claim against the Pere Marquette sufficiently negligible not to affect the financial position of its successor, even if it be ultimately allowed in full. I fail to see that the effect on the Chesapeake & Ohio will be any different than that of negligence claims for the same amount. Every operating railroad is likely to have such claims outstanding against it at all times. Their existence does not interfere with the consummation of a voluntary merger. A reasonable amount of contingent obligations may easily be allowed for. In any event, the determination whether or not eventual liability for contingent claims of dissenting stockholders are such as to affect "the public interest" required to be protected by author-

ization of a proposed merger is precisely the function of the Interstate Commerce Commission and should appropriately be left to the exercise of its informed discretion.

The Commission has control, under § 20a, over securities, which of course it does not have over a contingent demand for compensation for loss resulting from negligence. But differences in the foundation of contingent claims do not determine their relevance to the Commission's authority in approving a merger and in leaving the determination of such claims to State law. While the rights asserted by the appellants arise out of their holding of securities, they may be paid off in cash, if their claims turn out to be well founded, and need not be satisfied out of the securities of the successor corporation.

Neither what Congress has written, nor what it has implied by the purpose underlying what it has written, persuades me that a power which the Commission itself has vigorously disclaimed it must now exercise. The Commission has consistently declined to adjudicate as a matter of State law—or what is now found to be federal law—contested claims not deemed relevant to its determination of "the public interest." *E. g., Sullivan-Purchase-Service Freight Line, Inc.,* 38 M. C. C. 621; *Jessup-Control-Safeway Trails, Inc.,* 39 M. C. C. 233, 241; *Lee-Control; Carolina M. Exp. Lines, Inc.—Lease and Purchase—Reed,* 40 M. C. C. 405, 407. See also *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 26–27; *Cleveland, Cincinnati, Chicago & St. Louis R. Co.* v. *United States,* 275 U. S. 404, 414.

The Court is holding, in essence, that while State law governs the rights of railroad stockholders before and after voluntary merger proceedings it is supplanted during such proceedings. In thus thrusting upon the Commission a jurisdiction which it itself has rejected, the Court is depriving the States of a measure of control over their own corporations when this is not required by a fair reading of

the Transportation Act, and although the survival of such State law does not interfere with the national interest as found by the agency selected by Congress for determining that interest.

I would affirm the judgment.

THE CHIEF JUSTICE and MR. JUSTICE BURTON join in this dissent.

WOODS, HOUSING EXPEDITER, *v.* HILLS.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 437. Argued January 14, 1948.—Decided May 10, 1948.

Under § 205 of the Emergency Price Control Act, the Administrator brought an action based on an alleged overcharge of rent. The issue, by stipulation of the parties, was the validity of the second of two orders of the Rent Director reducing maximum rents on property of the defendant. The District Court entered judgment for the defendant in 1946. An appeal by the Administrator was not submitted in the Circuit Court of Appeals until September 10, 1947, and the Emergency Price Control Act expired by its terms on June 30, 1947. *Held:*

1. Section 204 (d) of the Emergency Price Control Act precluded the District Court in 1946 from determining the validity of the individual rent order, even though the defense to the action brought there was based on the alleged invalidity of the order, since exclusive jurisdiction to pass on the validity of a regulation or an order issued by the Administrator was vested in the Emergency Court of Appeals and in this Court upon review of judgments and orders of the Emergency Court. Pp. 211–214.

2. On remand, the District Court will not have jurisdiction to determine the validity of the second rent order and should not be directed by the Circuit Court of Appeals to pass on the validity of the order. Pp. 211–212, 218.

3. Since responsibility for functions with respect to rent control was transferred by Executive Order 9841 to the Housing Expediter rather than to the Department of Commerce, the necessary effect of the amendment of § 204 (e) of the Emergency Price Control Act

by the Supplemental Appropriation Act of July 30, 1947, was to abrogate the statutory right the defendant in the present case previously had to apply to the District Court for leave to file a complaint in the Emergency Court of Appeals, wherefore the latter court no longer has jurisdiction pursuant to § 204 (e) over any complaint which defendant may desire to file with it to contest the validity of the second rent order. Pp. 215–216.

4. Under § 1 (b) of the Emergency Price Control Act, the Emergency Court of Appeals still has jurisdiction to review rent orders issued under the Price Control Act, through the protest and complaint procedure prescribed by §§ 203 (a) and 204 (a) as amended, although a 1947 amendment expressly recognizes the right of the United States or any officer thereof to dismiss any protest under § 203 on the ground of laches. Pp. 216–218.

Upon an appeal from a judgment of the District Court for the defendant in an action by the Temporary Controls Administrator (succeeded by the Housing Expediter) under § 205 of the Emergency Price Control Act based on an alleged overcharge of rent, the Circuit Court of Appeals certified questions to this Court which are here answered, pp. 212–213, 218.

John R. Benney argued the cause for the Administrator. With him on the brief were *Solicitor General Perlman, Ed Dupree* and *Nathan Siegel.*

By special leave of Court, *George D. Rathbun, pro hac vice,* argued the cause and filed a brief for Hills.

Mr. Chief Justice Vinson delivered the opinion of the Court.

In this case, the Court of Appeals for the Tenth Circuit has certified questions of law concerning which it asks instructions for the proper decision of the cause pending in that court. Judicial Code, § 239; 28 U. S. C. § 346.

The certificate states that this is an action brought by the Administrator for treble damages and for an injunc-

tion under § 205 of the Emergency Price Control Act[1] and under the Rent Regulation for Housing.[2] Hills, the defendant below, remodeled apartments located in a Defense Rental Area, subject to the Rent Regulations, and duly registered them. Thereafter, on December 17, 1943, the maximum rents were reduced by the Area Rent Director pursuant to § 5 (c) of the Regulation; and on March 7, 1945, the Rent Director issued an order further reducing the maximum rents.

On trial in the District Court without a jury, the parties stipulated that the only issue was the validity of the second order. The District Court entered judgment for the defendant on October 29, 1946, holding that the burden was on the Administrator to establish the validity of the second order and that he had failed to introduce proof establishing its validity.

At the time the District Court entered its judgment, exclusive jurisdiction to pass on the validity of a regulation or order issued by the Administrator was vested in the Emergency Court of Appeals and in this Court upon review of judgments and orders of the Emergency Court. § 204 (d), 50 U. S. C. A. App. § 924 (d). However, the appeal by the Administrator from the judgment of the District Court was not submitted in the Circuit Court of Appeals until September 10, 1947, and the Emergency Price Control Act expired by its terms on June 30, 1947. § 1 (b), 50 U. S. C. A. App. § 901 (b).

The questions certified are as follows:

> "(1) On remand, will the District Court of the United States for the District of Kansas, First Division, have jurisdiction to determine the validity of

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[1] As amended, 50 U. S. C. A. App. §§ 901, 925.

[2] As amended, 8 Fed. Reg. 7322.

the second rent order and should we direct the District Court to pass on the validity of such rent order?

"(2) If the first question is answered in the negative, does the Emergency Court of Appeals still have jurisdiction to determine the validity of the second rent order?

"(3) If the second question is answered in the affirmative, and this court remands the cause with directions to enter judgment as prayed for against Hills, may Hills, under Sec. 204 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App., Sec. 924 (e)), apply to the District Court for leave to file in the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to the validity of the second rent order, and, upon proper petition and showing, obtain the relief provided for in Sec. 204 (e), and should we so direct on remand?"

There can be no doubt that the exclusive jurisdiction conferred on the Emergency Court of Appeals by § 204 (d)[3] precluded the District Court in 1946 from de-

[3] ". . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision." 56 Stat. 33.

termining the validity of the individual rent order even though the defense to the action brought there was based on the alleged invalidity of the order.[4]

The Emergency Price Control Act was to terminate on June 30, 1947. Section 1 (b), which fixed that date, expressly provides that "as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." 56 Stat. 24. Since the offense complained of in the case at bar occurred before the termination date, § 1 (b) would apply and the Emergency Court of Appeals would still have exclusive jurisdiction to pass on the validity of the second rent order, if additional prerequisites set forth in § 204 (e) (1) of the statute were satisfied.[5]

Jurisdiction of the Emergency Court of Appeals over any complaint arises, pursuant to § 204 (e) (1), when the court in which a civil or criminal enforcement proceeding is pending has granted the defendant leave to file in the Emergency Court of Appeals a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated, and the defendant has duly filed such a complaint. Prior to a 1947 amendment, § 204 (e) (1) provided that "Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceed-

[4] See *Bowles* v. *Willingham*, 321 U. S. 503, 510–511, 521 (1944); *Yakus* v. *United States*, 321 U. S. 414 (1944).

[5] Cf. *150 East 47th Street Corp.* v. *Porter*, 156 F. 2d 541 (E. C. A., 1946). Moreover, the terms of a 1947 amendment, discussed *infra*, pp. 215–217, clearly show congressional recognition that this exclusive jurisdiction continued after the termination date.

ing, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a).[6] Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. . . ." 59 Stat. 308.

However, the Supplemental Appropriation Act, 1948, approved July 30, 1947, amended § 204 (e) by striking out the first sentence of the foregoing provision and substituting the following: "Within sixty days after the date of enactment of this amendment, or within sixty days after arraignment in any criminal proceedings and within sixty days after commencement of any civil pro-

[6] Section 203 (a) provides *inter alia* for the filing of protests to rent orders issued by the Administrator at any time after issuance. The denial by the Administrator of such a protest is reviewable by a complaint filed in the Emergency Court of Appeals pursuant to § 204 (a).

ceedings brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or alleged violation of any price schedule effective in accordance with the provisions of section 206 with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841,[7] the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate." 61 Stat. 619.

Since responsibility for functions with respect to rent control was transferred by Executive Order 9841 to the Housing Expediter rather than to the Department of Commerce, the necessary effect of the foregoing amendment is to eliminate entirely the statutory right the defendant in the present case previously had to apply to the District Court for leave to file a complaint in the Emergency Court of Appeals. As a corollary, the latter court can no longer acquire jurisdiction pursuant to § 204 (e) over any complaint which defendant may desire to file with it to contest the validity of the second rent order.

We may now consider what effect the 1947 amendment, thus viewed, has upon the "exclusive jurisdiction" provision in § 204 (d), which was preserved by the saving clause of § 1 (b). If elimination of the complaint procedure of § 204 (e) as a remedy for those seeking to challenge rent orders meant the elimination of all provision for review by the Emergency Court of Appeals, it might be argued that preservation of the ban imposed by

[7] 12 Fed. Reg. 2645.

§ 204 (d) on district court adjudication of the validity of rent orders would be a denial of due process to a defendant charged with a violation of an order.

However, the 1947 amendment left unimpaired the provision in § 203 (a) for review of rent orders by filing protests with the Administrator (*i. e.*, the Housing Expediter, as transferee of the Administrator's rent control functions). A denial of such a protest may be reviewed in the Emergency Court of Appeals by filing a complaint pursuant to § 204 (a). Prior to an amendment added by the Stabilization Extension Act of 1944, protests could be filed under § 203 (a) only within a period of sixty days after the issuance of the regulation or order sought to be challenged. Under the 1944 amendment, which is preserved unchanged for rent orders, this period was extended so that protests can be filed "At any time after the issuance" of the regulation or order, although the 1947 amendment expressly takes cognizance of the right of the United States or any officer thereof to dismiss any protest under § 203 on the ground of laches.[8]

Thus, it appears that the Emergency Court of Appeals may still be able to acquire jurisdiction to review rent orders, issued under the Price Control Act, by means of the protest and complaint procedure of §§ 203 (a) and 204 (a). Accordingly, the exclusive jurisdiction provision in § 204 (d) is not a meaningless anomaly so far as review of rent control orders is concerned, and it remains as substantial a barrier to review of the second rent order by the District Court as it was held to be in *Yakus* v. *United States,* 321 U. S. 414 (1944). There this Court

[8] ". . . Nothing herein shall be construed as in any way affecting the right of the United States or any officer thereof to dismiss any protest under section 203 of the Emergency Price Control Act of 1942, as amended, or defend against any complaint under section 204 (e) of such Act on the ground of laches." 61 Stat. 619.

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ruled that defendants could not attack the validity of price regulations in a prosecution in a District Court even though the Emergency Price Control Act as then drawn made no provision for review by the complaint procedure later set up under § 204 (e) (and now abandoned so far as rent orders are concerned). The only judicial review then available required as a preliminary the filing of a protest to the Administrator under § 203 (a) within sixty days after the promulgation of the order or regulation. That statutory review procedure, whose constitutionality was upheld in the *Yakus* case, is still preserved to defendants charged with violations of rent orders issued under the Emergency Price Control Act of 1942.[9] If anything, the judicial review still available to such defendants is even broader than the procedure sustained in the *Yakus* case, since the sixty-day limitation on the filing of protests no longer applies to rent orders.

In view of the foregoing, we answer question (1) in the negative. In answer to question (2), the Emergency Court of Appeals no longer has jurisdiction pursuant to § 204 (e) to determine the validity of the second rent order.

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[9] Of course the District Court can withhold judgment so that it may give effect to any determination by the Housing Expediter or the Emergency Court of Appeals that might result from the defendant's pursuit of this remedy.

MANDEVILLE ISLAND FARMS, INC. ET AL. *v.* AMERICAN CRYSTAL SUGAR CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 75. Argued November 19, 1947.—Decided May 10, 1948.

Growers of sugar beets brought an action under the Sherman Anti-trust Act, against a defendant who refined beet sugar and distributed it in interstate commerce, for triple the amount of damages sustained by reason of an alleged violation of the Act. The amended bill of complaint alleged, *inter alia,* that the defendant had conspired with other refiners to fix uniform prices to be paid to growers for sugar beets grown in northern California; that the refiners had a monopoly of the seed supply and the only practical market for beets grown in the area; and that, as a consequence of the conspiracy and the price-fixing formula, the complainants received less for their beets. Other allegations showed the unique character of the sugar beet industry in the area; the dominant position of the refiners in the industry; and the effects of the conspiracy on interstate commerce. On appeal from a judgment dismissing the complaint, *held:*

1. The amended complaint stated a cause of action under the Act. Pp. 221–246.

2. A restraint of the type forbidden by the Act, though arising in intrastate commerce, falls within the Act's prohibition if its actual or threatened effect on interstate commerce is sufficiently substantial. Pp. 227–235.

3. The refiners' conspiracy was of the type forbidden, even though the price-fixing was by purchasers and though the claimants of treble damages are sellers instead of customers or consumers. P. 235.

4. Monopolization of local business, when achieved by restraining interstate commerce, is violative of the Sherman Act. Pp. 235–236.

5. The conspiracy being shown to affect interstate commerce adversely to Congress' policy, the amount of the nation's sugar industry which the refiners control is irrelevant, so long as control is exercised effectively in the area involved. P. 236.

6. Mere change in the form of a commodity or even complete change in essential quality by intermediate refining or processing

does not defeat application of the Sherman Act to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act. P. 238.

7. The mere fact that the price-fixing in this case related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar. P. 238.

8. In an integrated industry such as this, stabilization of prices paid for the only raw material inevitably tends toward reducing competition in the distribution of the finished product. P. 241.

9. The interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are indicated by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar. Pp. 241–242.

10. The monopolistic effects of the refiners' agreement to pay uniform prices for beets, in the circumstances of this case, not only deprived the growers of any competitive opportunity for disposing of their crops, but also tended to increase control over the quantity of sugar sold interstate; and through the tie-in provision interlaced those interstate effects with the price paid for the beets. P. 242.

11. The fact that some growers, though not the complainants, may have been benefited rather than harmed does not render the combination legal or immune to liability for violating the Act. Pp. 242–243.

12. Both public and private injury are indicated in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiners' controls, there are special injuries affecting the growers. P. 243.

13. The amendment of the complaint in this case so as to eliminate the words "sugar and sugar beets" from one of the allegations that the refiners had conspired to "monopolize and restrain trade" while leaving in many other allegations to the same effect, did not eliminate, nor constitute a disavowal, disclaimer or waiver by the complainants of, the charge of restraint of trade in sugar, the only interstate commodity. Pp. 244–246.

159 F. 2d 71, reversed.

Petitioners' amended complaint in an action against respondent to recover triple damages under the Sherman Act was dismissed by the District Court. 64 F. Supp. 265. The Circuit Court of Appeals affirmed. 159 F. 2d

71. This Court granted certiorari. 331 U. S. 800. *Reversed and remanded,* p. 246.

Stanley M. Arndt argued the cause and *Guy Richards Crump* filed a brief for petitioners.

Pierce Works argued the cause for respondent. With him on the brief was *Louis W. Myers.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The action is for treble damages incurred by virtue of alleged violation of the Sherman Act, §§ 1 and 2. 26 Stat. 209, 38 Stat. 731, 15 U. S. C. §§ 1, 2, 7, 15. The case comes here on certiorari, 331 U. S. 800, from affirmance by the Circuit Court of Appeals, 159 F. 2d 71, of a judgment of the District Court, 64 F. Supp. 265. That judgment dismissed the amended complaint as insufficient to state a cause of action arising under the Act. In this posture of the case, the legal issues are to be determined upon the allegations of the amended complaint.[1]

The main question is whether, in the circumstances pleaded, California sugar refiners who sell sugar in interstate commerce may agree among themselves to pay a uniform price for sugar beets grown in California without incurring liability to the local beetgrowers under the Act. Narrowly the question is whether the refiners' agreement

[1] The original complaint contained three counts, the first alleging violations of the Sherman Act and the second and third charging breach of contracts made in 1940 and 1941 respectively. In order to expedite decision and review upon the Sherman Act contention, by stipulation the amended complaint was filed setting forth, with an amendment to be noted, see note 5, only the allegations of the Sherman Act count. The stipulation provided for following this course without prejudice to further assertion by petitioners of rights under the two contract counts within a specified period following final determination of the Sherman Act issues.

together with the allegations made concerning its effects shows a conspiracy to monopolize and to restrain interstate trade and commerce or one thus affecting only purely local trade and commerce.

The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding, may be summarized as follows: Petitioners' farms are located in northern California, within the area lying north of the thirty-sixth parallel. The only practical market available to beet growers in that area was sale to one of three refiners.[2] Respondent was one of these. Each season growers contract with one of the refiners to grow beets and to sell their entire crops to the refiner under standard form contracts drawn by it. Since prior to 1939 petitioners have thus contracted with respondent.

The refiners control the supply of sugar beet seed. Both by virtue of this fact and by the terms of the contracts, the farmers are required to buy seed from the refiner. The seed can be planted only on land specifically covered by the contract. Any excess must be returned to the refiner in good order at the end of the planting season.

The standard contract gives the refiner the right to supervise the planting, cultivation, irrigation and harvest-

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[2] It was alleged that the beets, when harvested, are "bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. . . . when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured."

There were also allegations that initial outlay, annual upkeep and operating expenses, and time required for erecting and equipping a refinery, were so great that no competition from any new refinery could be expected short of two years at best; that the three refiners had a monopoly in the area of the supply of seeds and of refining; and that no grower in the region could sell beets at a profit except to one of the three refiners.

ing of the beets, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. Before delivering beets to the company, the farmers must make preliminary preparations for processing them into raw sugar.[3] The refiner has the option to reject beets if the contract conditions are not complied with and if the beets are not suitable in its judgment for the manufacture of sugar.

Prior to 1939 the contract fixed the grower's price by a formula combining two variables, a percentage of the refiner's net returns per hundred pounds from sales of sugar and the sugar content of the individual grower's beets determined according to the refiner's test.[4]

Sometime before the 1939 season the three refiners entered into an agreement to pay uniform prices for sugar beets. The mechanics of the price-fixing arrangement were simple. The refiners adopted identical form contracts and began to compute beet prices on the basis of the average net returns of all three rather than the separate returns of the purchasing refiner. Inevitably all would pay the same price for beets of the same quality.

Since the refiners controlled the seed supply and the only practical market for beets grown in northern California, when the new contracts were offered to the farmers, they had the choice of either signing or abandoning sugar beet farming. Petitioners accordingly contracted with respondent under this plan during the 1939, 1940 and 1941 seasons. The plan was discontinued after the 1941

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[3] These include cutting off the beet tops, trimming the crowns in a specified way, and removing all foreign substances likely to interfere with factory work.

[4] Net returns from sugar sales were measured by gross sales price less selling expenses directly applicable to sugar. Monthly settlements were made for beets delivered during the preceding month on the estimated net returns of the refiner. But final settlement had to be deferred until the end of the season when net returns could be accurately determined.

season. Because beet prices were determined for the three seasons with reference to the combined returns of the three refiners, the prices received by petitioners for those seasons were lower than if respondent, the most efficient of the three, had based its prices on its separate returns.

The foregoing allegations set forth the essential features of the contractual arrangements between the refiners and the growers and of the agreement among the refiners themselves. Other allegations were made to complete the showing of violation and injury. They relate specifically to the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.

With reference to the industry in general, it was stated that sugar beets were grown during the seasons 1938 to 1942 on large acreages not only in northern California but also in Utah, Colorado, Michigan, Idaho, Illinois and other states. The crops so grown, when harvested, were not "sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce." Then follow the allegations summarized above in note 2 concerning the bulky and semiperishable nature of sugar beets, the impossibility of transporting them over long distances or of storing them cheaply or safely, their rapid deterioration when ripe, and the necessity for prompt harvesting and marketing. These allegations must be taken as intended and effective to put the agreements complained of in the general setting of

the industry's unique structure and special mode of operation.

The specific allegation is added that the sugar manufactured by respondent and the other northern California refiners from beets grown in the region "was, during all of said period [1938 to 1942], sold in interstate commerce throughout the United States."

By way of legal as well as ultimate factual conclusions the amended complaint charged that respondent had unlawfully conspired with the other northern California refiners to "monopolize and restrain trade and commerce [5] among the several states and to unlawfully fix prices to be paid the growers . . . all in violation of the anti-trust laws . . ."; and that each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price on the agreed uniform basis of average net returns.

There were further charges that prior to 1939 the northern California refiners had "competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses," with the result that for 1938 respondent secured substantially greater "net gross receipts of sales of sugar" than the other refiners. These in turn were reflected in the payment of 29½ to 52½ cents per ton more to petitioners and other growers dealing with respondent than was paid by the other refiners to their growers.

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[5] At this point the words "in sugar and sugar beets" appeared in the original complaint. They were stricken from the amended complaint by petitioners' counsel prior to dismissal of that complaint. Cf. note 1. This change however did not affect numerous other allegations remaining in the amended complaint concerning the combination's restrictive and monopolistic effects upon interstate trade in sugar. See note 6 and text; also note 24 and text Part IV *infra*.

However, for the seasons 1939, 1940 and 1941, under the new uniform contracts and prices, "there was no longer any such competition . . . ." Instead it was alleged upon information and belief that, as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or "as it would have had said conspiracy not existed." In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free, and petitioners "did not receive the reasonable value of their sugar beets."

Further charges were that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners "producing and selling raw sugar in interstate commerce . . . in competition with each other . . . they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system . . ."; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, "in so far as the growers were concerned," as if they were one corporation owning and controlling all factories in the area, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring.[6]

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[6] Paragraph XIX of the amended complaint summarized petitioners' conclusions as follows: "By reason of the foregoing acts of the defendant and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein* was not only substantially lessened but *was destroyed,* the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid." (Emphasis added.) Cf. notes 5 and 24.

We are not concerned presently with the allegations relating to the injuries and amounts of damages inflicted upon petitioners,[7] except to say that they are sufficient to present those questions for support by proof, if the allegations made to show a cause of action arising under the statute are sufficient for that purpose.

In our judgment the amended complaint states a cause of action arising under the Sherman Act, §§ 1 and 2, and the complaint was improperly dismissed.

I.

Broadly petitioners regard the entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth, as a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it that, for purposes of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp.

Respondent, on the contrary, broadly severs the phase or phases of growing and selling beets from the later ones of refining them and of marketing the sugar. The initial growing process together with sale of the beets, and it would seem also the intermediate stage of refining, are taken to be "purely local," since all occurred entirely

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[7] It is not clear whether damages were to be measured by the difference between the prices actually paid and those that would have been paid if based on respondent's separate returns, or by the difference between the prices paid and the prices set by the Secretary of Agriculture, pursuant to the Sugar Act of 1937, 50 Stat. 910, 7 U. S. C. § 1131 (d); see 5 Fed. Reg. 5231. But that is an issue that need not concern us now. Petitioner Mandeville Island Farms prayed judgment for $315,043.80; petitioner Zuckerman for $112,192.14.

within California; therefore were wholly intrastate events; and consequently were beyond the Sherman Act's reach.

Connected with this severance is the assertion that the complaint alleges no monopolistic or restrictive effects upon interstate commerce, but only such effects in the intrastate phases of the industry.

Much stress is laid upon the so-called interruption of the sequence at the refining stage. Prior to the interruption only beets are involved, afterward only sugar. Since the two commodities are different and all that affects the beets takes place in California, including the restraints alleged upon their sale, the trade and commerce in beets is wholly distinct from that in sugar and is entirely local, as are therefore the restraint and monopolization of that trade. Admittedly once the beets are converted into sugar and the sugar starts on its interstate journey to the tables of the nation, interstate commerce becomes involved. But only then is it affected, and nothing occurring before the journey begins or at any rate before the beets become sugar substantially affects or, for purposes of the statute's application, has relevance to that commerce.

Thus sugar together with its interstate sale and transportation is absolutely divorced from sugar beets, their production, sale and delivery to the refiner. Manufacture breaks the relationship and with it all consequences growing out of the restraints for the interstate processes and the purposes of the statute. In other words, since the restraints precede the interstate marketing of the sugar and immediately affect only the local marketing of the beets, they have no restrictive effect upon the trade and commerce in sugar.

This very nearly denies that sugar beets contain sugar. It certainly denies that the price of beets and restrictions upon it have any substantial relation in fact or in legal

significance for the statute's purposes to the price of sugar sold interstate, when the restrictions take place within the confines of a single state and before the interstate marketing process begins.

II.

The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard* v. *Filburn,* 317 U. S. 111, or the scope of the Sherman Act's coverage. The artificial and mechanical separation of "production" and "manufacturing" from "commerce," without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. *United States* v. *E. C. Knight Co.,* 156 U. S. 1. Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving "primarily" only "production" or "manufacturing," although the vast part of the sugar produced was sold and shipped interstate,[8] and this was the main end of the enterprise. The interstate distributing phase,

[8] It has been previously noted here that the Court applied these labels as a heritage from prior decisions under the commerce clause, dealing not as the *Knight* case with an act or acts of Congress, but with the validity of state statutes, *Wickard* v. *Filburn,* 317 U. S. 111, 121; *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 543–545, an approach reflecting Marshall's idea of the mutual

however, was regarded as being only "incidentally," "indirectly," or "remotely" involved; and to be "incidental," "indirect," or "remote" was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See *Wickard* v. *Filburn, supra,* at 119 *et seq.*

The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.[9]

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exclusiveness of state and national power in this area and ignoring the later evolution of different conceptions in *Cooley* v. *Board of Wardens,* 12 How. 299. See *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 412–427.

[9] Compare, *e. g., United States* v. *E. C. Knight Co.,* 156 U. S. 1, with *Standard Oil Co.* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Hammer* v. *Dagenhart,* 247 U. S. 251, with *United States* v. *Darby,* 312 U. S. 100; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, with *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Chicago, etc., R. Co.,* 282 U. S. 311, and *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, with *United States* v. *Lowden,* 308 U. S. 225; *Hopkins* v. *United States,* 171 U. S. 578, with *Stafford* v. *Wallace,* 258 U. S. 495; *Employers' Liability Cases,* 207 U. S. 463, 498, with *Virginian R. Co.* v. *Federation,* 300 U. S. 515, 557, and *Weiss* v. *United States,* 308 U. S. 321; *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495 and authorities cited, with *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, and *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408.

We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in *Wickard* v. *Filburn, supra.*[10] Suffice it to say that after coming back to life again in the *Northern Securities* case, 193 U. S. 197, for matters of transportation, the Sherman Act had a second rebirth in 1911 with the decisions in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Co.,* 221 U. S. 106. Cf. *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 553 *et seq.*

Not thereafter could it be foretold with assurance that application of the labels of "production" and "manufacture," "incidental" and "indirect," would throw protective covering over those processes against the Act's consequences. Very soon also came the *Shreveport Rate Cases,* 234 U. S. 342, again in the field of transportation, but inevitably to add force and scope to the *Standard Oil* and *American Tobacco* rulings that manufacturing companies lay within the reach of the power and of the

[10] See particularly the discussion in 317 U. S. at 119–120. See also *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408; *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1; *United States* v. *Darby,* 312 U. S. 100; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645, 883.

The *Filburn* case dealt with the second Agricultural Adjustment Act and the power of Congress to enact it. But, referring to the first Interstate Commerce Act and the Sherman Act, the Court in the *Filburn* case (pp. 121–122) said that those statutes "ushered in new phases of adjudication" requiring a different approach to interpretation of the commerce clause, although "when it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress." For the latter statement the *Knight* case was cited as the principal example.

statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

With extension of the *Shreveport* influence to general application,[11] it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley* v. *Board of Wardens,* 12 How. 299. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the haltering labels of "production" and "manufacturing" and

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[11] The doctrine encompassed fundamentally not merely an expanding factor in federal power over transportation. It was rather an integer in the sum of power over commerce, of which authority over transportation was but a part. The "affectation" approach was actually a revival of Marshall's "necessary and proper" doctrine, cf. *Wickard* v. *Filburn,* 317 U. S. 111, 120, 122, but unqualified by his idea of mutual exclusiveness, see note 8. Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act. Time and events were disclosing ever more clearly the impact of their effects upon interstate trade and commerce. And this was posing the same necessity for regulation as in the field of transportation, in order to protect and preserve the national commerce and carry out Congress' policy regarding it.

gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action.

The transition, however, was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1930's. But after the historic decisions of 1911, and even more following the *Shreveport* decision, a constantly growing number of others rejected the idea that production and manufacturing are "purely local" and hence beyond the Act's compass, simply because those phases of a combination restraining or monopolizing trade were carried on within the confines of a single state or, of course, of several states.[12] The struggle for supremacy between the conflicting approaches was long continued. But more and more until the climax came in the late 1930's, this Court refused to decide those issues of power and coverage merely by asking whether the restraints or monopolistic practices, shown to have the forbidden effects on commerce, took place in a phase or phases of the total economic process which, apart from other phases and from the outlawed effects, occurred only in intrastate activities.[13]

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[12] *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Keystone Watch Case Co.*, 218 F. 502; *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 F. 254; *United States* v. *E. I. Du Pont de Nemours & Co.*, 188 F. 127. See Mr. Justice Holmes dissenting in *Hammer* v. *Dagenhart*, 247 U. S. 251, 279.

[13] *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255; *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

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In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.[14] For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

The *Shreveport* doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach.

Obviously therefore the criteria respondent would have us follow furnish no basis for reaching the result it seeks.

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[14] In *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 297, we said: "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." The decisions cited were *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457; cf. *Local 167* v. *United States,* 291 U. S. 293, 297, and *United States* v. *Hutcheson,* 312 U. S. 219.

Only by returning to the *Knight* approach, and severing the intrastate events relating to the beets, including the price restraints, from the later events relating to the sugar, including its interstate sale, could we conclude there were no forbidden restraints or practices touching interstate commerce here. At this late day we are not willing to take that long backward step.

III.

We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which recovery of treble damages by the petitioners is authorized.

It is clear that the agreement is the sort of combination condemned by the Act,[15] even though the price-fixing was by purchasers,[16] and the persons specially injured under the treble damage claim are sellers, not customers or consumers.[17] And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce, is con-

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[15] *United States* v. *Frankfort Distilleries,* 324 U. S. 293, and authorities cited.

[16] Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co.* v. *United States,* 328 U. S. 781; *United States* v. *Patten,* 226 U. S. 525; *Swift & Co.* v. *United States,* 196 U. S. 375. Each case involved outlawed practices by persons who were both purchasers and sellers, and forbidden effects upon sellers as well as purchasers and consumers.

[17] See note 16.

demned by the Act. *Stevens Co.* v. *Foster & Kleiser,* 311 U. S. 255, 261. And a conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. *United States* v. *Frankfort Distilleries,* 324 U. S. 293.

The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co.* v. *United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States* v. *South-Eastern Underwriters Assn., supra,* at 553.

Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned, *Indiana Farmer's Guide* v. *Prairie Farmer,* 293 U. S. 268, 279, *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 225, the conspiracy being shown to affect interstate commerce adversely to Congress' policy. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States* v. *Darby,* 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States* v. *Walsh,* 331 U. S. 432, 437–438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard* v. *Filburn, supra,* or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 221–222.

Moreover, as we said in the *Frankfort Distilleries* case, ". . . there is an obvious distinction to be drawn between

a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." 324 U. S. 293, 297. That statement is as true of the situation now presented as of the one then before us, although instead of restraining trade in order to control a local market petitioners control a local market in which they purchase. For this is not a case involving only "a course of conduct wholly within a state"; it is rather one involving "conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states," and in such a case it is not material that the source of the forbidden effects upon that commerce arises in one phase or another of that program.

In view of all this, it is difficult to understand respondent's argument that the complaint does not allege that the conspiracy had any effect on interstate commerce, except on the basis of the discarded criteria discussed in Part II above. The contention ignores specific allegations which we have set forth. But apart from that fact it rests only on a single grounding, which in the circumstances of this case is little, if any, more than a different phrasing of the criteria supplanted by the *Shreveport* approach.

This is that the change undergone in the manufacturing stage when the beets are converted into sugar makes the case different, for the Sherman Act's objects, than it would be if the identical commodity were concerned from the planting stage through the phase of interstate distribution, *e. g.*, if the commodity were wheat, as was true in *Wickard* v. *Filburn, supra,* or raisins purchased by packers from growers and shipped interstate after packing, cf. *Parker* v. *Brown,* 317 U. S. 341, 350.

We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented.[18] For mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act.[19] Again, as we have said, the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry. Hence in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

Indeed that severance would not necessarily take place if the manufacturing stage had produced a much greater change in commodities than was effected here. But under the facts characterizing this industry's operation and the tightening of controls in this producing area by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed

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[18] Compare *Arkadelphia Milling Co.* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, with *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

[19] *Swift & Co.* v. *United States*, 196 U. S. 375; *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416.

they permeated the entire structure of the industry in all its phases, intrastate and interstate.

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining, and the distribution of sugar both interstate and local.

Some of these controls have been built up by taking advantage of the opportunities afforded by the industry's unique character, both natural and in its general pattern and habits of organization; [20] others by utilizing the key positions these advantages give the refiners to put contractual restraints upon the growers by their separate actions; [21] and still greater ones by the refiners' ability,

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[20] The natural factors include the peculiar nature of the crop in its limitation to a single primary and commercially profitable use, the necessity for immediate and nearby marketing to follow directly upon harvesting, and the well-known fact that sugar beets are grown only in widely scattered regions specially adapted to the crop in soil, climate and availability of water in large quantities during the growing season.

[21] Resulting in large part from the natural limitations stated in note 20 and the fact that extracting the sugar content from the beets is an elaborate and technical process, is the further important fact that the processing cannot be done by the growers individually or even in small cooperative groups, but requires specialized and large-scale business organization, equipment and investment. All these factors and perhaps others combine to make the refining stage of the industry a specialized manufacturing one to be carried on separately from growing, to establish the refiners' key place in the entire industry, and thus to leave the growers completely at the refiners' mercy for the profitable production of beets except as the latter may compete among themselves.

by virtue of their central and dominating place thus achieved, to agree among themselves upon further restrictions.

Even without the uniform price provision and with full competition among the three refiners, their position is a dominating one. The growers' only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market. The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible. Upon the allegations, it is absolutely so for any single growing season. A tighter or more all-inclusive monopolistic position hardly can be conceived.

When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his product. Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers.

There were indeed two distinct effects flowing from the agreement for paying uniform growers' prices, one immediately upon the price received by the grower rendering

it devoid of all competitive influence in amount; the other, the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.

The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept. By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufactured, sold and shipped interstate from the northern California producing area. In substance and roughly, if not precisely, they allocated among themselves the market for California beets substantially upon the basis of quotas competitively established among them at the time the uniform price arrangement was agreed upon. It is hardly likely that any refiner would have entered into an agreement with its only competitors, the effect of which would have been to drive away its growers, or therefore that many of the latter would have good reason to shift their dealings within the closed circle. Thus control of quantity in the interstate market was enhanced.

This effect was further magnified by the fact that the widely scattered location of sugar beet growing regions and their different accessibilities to market [22] give the refiners of each region certainly some advantage over growers and refiners in other regions, and undoubtedly large ones over those most distant from the segment of the interstate market served by reason of being nearest to hand.

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects

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[22] See note 20.

of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar. The percentage factor of interstate receipts from sugar which the grower's contract specifies shall enter his price for beets makes that price dependent upon the price of sugar sold interstate. The uniform agreement's effect, when added to this, is to deprive the grower of the advantage of the individual efficiency of the refiner with which he deals, in this case the most efficient of the three, and of the price that refiner receives. It is also to reflect in the grower's price the consequences of the combination's effects for reducing competition among the refiners in the interstate distribution of sugar.

In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating its entire structure. This was the necessary and inevitable effect of the agreement among the refiners to pay uniform prices for beets, in the circumstances of this case. Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate; and finally by the tie-in provision they interlaced those interstate effects with the price paid for the beets.

These restrictive and monopolistic effects, resulting necessarily from the practices allegedly intended to produce them, fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent, both to the public and to private individuals.

It does not matter, contrary to respondent's view, that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combi-

nation's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner's controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.

The fact that that arrangement is the source of both effects cannot be taken to mean that neither is outlawed by the statute, in view of their interdependence and the completely unified and comprehensive nature of the scheme as respects its interstate and intrastate phases. The policy of the Act is competition. It cannot be flouted, as has been done here, by artificial nomenclatural severance of the plan's forbidden effects, any more than by such a segmentation of the integrated industry into legally unrelated phases. Nor can the severance be made in such a case merely by virtue of the fact that a refining or manufacturing process constitutes an intermediate stage in the whole.

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn, or other products, susceptible of various uses and under con-

ditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change, than does extracting the sugar content of beets to make raw sugar.

We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day.[23]

IV.

Little more remains to be said concerning the amended complaint. The allegations comprehend all that we have set forth. We do not stop to restate them, leaving their substance at this point for reference to the summary made at the beginning of this opinion.

Respondent has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the

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[23] It is suggested that *Parker* v. *Brown*, 317 U. S. 341, is inconsistent with our conclusion here. The Court there held first that the Sherman Act did not apply because the program was sponsored by the State of California. Contrary to the present suggestion, the opinion assumes that the relation between the intrastate and the interstate commerce in raisins was sufficient to justify federal regulation, if the state-sponsored program of prorating had been "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U. S. at 350. The case therefore contains no suggestion, on the facts or on the law, contrary to the result now reached.

hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words "sugar and sugar beets" from one of the allegations that the refiners had conspired to "monopolize and restrain trade and commerce among the several states . . . ." [24]

Respondent takes this elision as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity.

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[24] See note 5. By way of explaining the deletion, the record contains only the statement of the stipulation, cf. note 1, that the amended complaint eliminated "what the Court considered an ambiguity in the [original] complaint." With no further support from the record, it has been assumed that the ambiguity so elided was the reference to restraint of interstate trade in *sugar* and hence the petitioners in making it stated themselves out of court.

Apart from the fact that the elision did not affect numerous other like allegations, see note 6 and text, the deletion included the specifications of both "sugar and sugar beets." From this the literal inference, if any of the sort could be made, would be that the elision was intended to withdraw all charges of monopoly or restraint of trade, whether in sugar or in beets, and thus to concede there was no case under the Sherman Act, a conclusion obviously at war with the remaining allegations of restraint of trade in both sugar and sugar beets.

But, if any difference between the two could be assumed as having been intended, it is much more likely that the supposed ambiguity deleted arose from the reference to interstate trade in *beets*, since the allegation as a whole referred only to "interstate trade and commerce" and on the facts pleaded the only trade in beets was intrastate (considered apart, as respondent would do, from its relation to and effects upon the trade in sugar).

In any event the case is to be decided upon the sum of the allegations of the amended complaint, not upon conjecture as to why a particular and, we think, immaterial amendment of one allegation was made. Indeed the entire allegation could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it.

The amendment did not eliminate or affect numerous other allegations which in effect repeated the charge in various forms and with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specified trade or commerce in sugar,[25] others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar. We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer or waiver.

The allegations are comprehensive and, for the greater part, specific concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER joins, dissenting.

It appears to me that the Court's opinion is based on assumptions of fact which the petitioner disclaimed in the court below. These assumptions are permissible inferences from the amended complaint only if we disregard the way in which the amendments came about.

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[25] *E. g.*, in the allegation quoted in note 6, as well as others set forth in the text preceding that note.

On hearing, the trial judge apparently considered that a cause of action would be stated only if the complaint alleged that the growing contracts affected the price of sugar in interstate commerce. But the contracts accompanying the pleadings indicated that the effects ran in the other direction. The market price of interstate sugar was the base on which the price of beets was to be figured. The latter price was derived from the income which respondent and others received from sugar sold in the open market over the period of a year. The trial judge therefore suggested that the references to restraint of trade in sugar in interstate commerce created an ambiguity in the complaint. Accordingly, the plaintiff, at the suggestion of the court and for the specific purpose of this appeal, filed an amended complaint which completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce, and eliminated the two other counts "to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient." [1] The District Court then held that since no beets

[1] The full text of the Stipulation and Order which was executed by counsel for both parties, and by the District Judge, is as follows:

"Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice

whatever moved in interstate commerce and since there was no charge in the amended complaint that the cost or quality of the product which did move in interstate commerce was in any way affected, no cause of action was

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to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

"Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

"1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract in use in 1938, 1939, 1940 and 1941, and omitting the second and third counts.

"2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includible therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

"3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includible therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includible therein by amendment.

"4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

"5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the amended complaint or the filing of a separate action or actions hereinabove set forth, shall continue until six months after the determination on appeal as to the sufficiency of the first count has become final."

stated. The appeal was taken and the Circuit Court of Appeals affirmed.

This Court, however, decides the case as though the original complaint as it related to sugar had not only remained unchanged but had been proved by evidence. Despite the deletion from the complaint of the allegation concerning the price of sugar, the Court assumes, without allegation or evidence, that the price of sugar is affected and on that basis builds its thesis that the Sherman Act has been violated. I think in fairness to the litigants and the District Court, the petitioner's case should be disposed of here on the same basis on which it was pleaded to the courts below.

On the proceedings in the courts below, I would affirm the judgment of the District Court.

KENNEDY ET AL. v. SILAS MASON CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 590. Argued April 20, 1948.—Decided May 17, 1948.

Petitioners, who worked in a Government-owned plant in which respondent produced munitions under a cost-plus-fixed-fee contract with the War Department, sued respondent for overtime compensation under the Fair Labor Standards Act. The District Court's summary judgment for respondent was affirmed by the Circuit Court of Appeals. Among other issues involved were whether petitioners were employees of the Government or of the private contractor and whether munitions produced for shipment across state lines are produced for "commerce" and are "goods" within the meaning of the Act. Substantial claims of the petitioners would be denied or large sums added to the cost of the war by the answers to the questions raised, and many other cases would be governed by the decision. Also, certain contentions were made in this Court

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which were not made in the courts below; and an adequate consideration of the problem would require consideration of three different acts of Congress, two of which were not properly before this Court on the record in this case. *Held:* Without intimating any conclusion on the merits, the judgments are vacated and the cause is remanded to the District Court for reconsideration and amplification of the record in the light of this Court's opinion and of present contentions. Pp. 251–257.

(a) The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning, the practical construction put on them by the parties, and reduction of a mass of conflicting contentions as to fact and inference from facts, is a task primarily for a trial court instead of this Court. P. 256.

(b) Summary procedures under Rule 56 of the Federal Rules of Civil Procedure, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice. Pp. 256–257.

(c) As a matter of good judicial administration, this Court will not attempt to decide these far-reaching issues on such a record presenting an indefinite factual foundation and involving such a welter of new contentions and statutory provisions, but will await the presentation of these issues on a record containing a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. P. 257.

164 F. 2d 1016, judgments vacated and cause remanded.

In an action by petitioners to recover overtime compensation claimed under the Fair Labor Standards Act, the District Court first denied, 68 F. Supp. 576, but later granted, 70 F. Supp. 929, summary judgment for respondent. The Circuit Court of Appeals affirmed. 164 F. 2d 1016. This Court granted certiorari. 333 U. S. 841. *Judgments vacated and cause remanded*, p. 257.

Leonard Lloyd Lockard argued the cause and filed a brief for petitioners.

William L. Marbury and *Charles D. Egan* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* in support of petitioners were filed by *Solicitor General Perlman* and *Robert L. Stern* for the United States; and *June P. Wooten.*

Briefs of *amici curiae* urging affirmance were filed by *J. R. L. Johnson, Jr.* and *Robert A. Fulwiler, Jr.* for the Hercules Powder Co.; *Ernest S. Ballard, Frank F. Fowle, Jr.* and *Charles R. Kaufman* for E. I. du Pont de Nemours & Co.; and *Grover T. Owens* and *E. L. McHaney, Jr.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case involves questions as to the application of the overtime provisions of the Fair Labor Standards Act [1] to certain persons who worked in a government-owned plant in which respondent produced munitions under a cost-plus-fixed-fee contract with the War Department. It involves such subsidiary issues as whether the plaintiffs were employees of the Government or of the private contractor, whether munitions produced for shipment across state lines in war use are produced for "commerce" [2] and whether they are "goods" [3] within the meaning of the Act. Substantial claims of petitioners may be denied or large

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. § 201.

[2] The Act defines commerce as follows: " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

[3] The Act defines goods as follows: " 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

sums added to the cost of the war by the answers to these questions, and many cases other than this will be controlled by its decision.

The manner in which the case has thus far developed raises the question whether as a matter of good judicial administration this Court should attempt to decide these far-reaching issues on this record.

No one questions that, taking its allegations at their face value, the complaint in this case states a cause of action under the Fair Labor Standards Act. Summary judgment has gone against the plaintiffs because, by affidavit and exhibits, the allegations have been found unsustainable. The defendant filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure [4] "on the ground that defendant is entitled to a judgment as a matter of law." The motion, so far as the Fair Labor Standards Act was concerned, was based on an affidavit "which states facts showing that as a matter of law neither complainants nor defendant were covered" by the Act in that neither "were engaged in commerce, or in the production of goods for commerce." Made part of the affidavit by reference were defendant's construction and operation contract with the Government and some 22 supplements or change orders covering nearly 200 pages of the record. The complainants then filed a supplemental complaint which added by reference all regulations and interpretative bulletins of the Department of Labor and Administrator of the Fair Labor Standards Act clarifying and explaining it. And, as against defendant's affidavit and exhibits, the plaintiffs,

[4] Rule 56 provides that the trial court may award summary judgment after motion, notice and hearing, provided the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

as recited in the District Court's opinion, offered by reference affidavits of three former employees of the contractor showing the customs of payment and operation as bearing on the issue of whether they were government employees or those of the private contractor. The affidavits do not appear in the record, but parts deemed relevant are set out in the court's opinion.

On this basis the District Court first denied summary judgment. 68 F. Supp. 576. It was of the view that the plaintiffs, whatever the forms of the transaction, were in reality employed by the Government and, hence, the Fair Labor Standards Act by its own terms did not cover them. But it held that they were covered by § 4 (b) of the Act of July 2, 1940,[5] and were entitled to recover overtime under it.

On rehearing, the court concluded, however, that no remedy under this latter Act was available to them in this action as it was not pleaded. Accordingly, it granted summary judgment against them. 70 F. Supp. 929. The Circuit Court of Appeals, Fifth Circuit, sitting *en banc* affirmed. 164 F. 2d 1016. It held that the plaintiffs were in substance employees of the United States, that munitions were not a part of commerce within the meaning of the Act, and that in any event munitions were not "goods" within the meaning of the Act. One judge, concurring, did not pass on the question whether petitioners were employees of the Government but held only that munitions were produced for war, not for commerce. One judge dissented on the ground that the whole system "was designed and operated so that the United States should not be the employer" and considered that munitions produced for transportation to a place outside of the State were produced for commerce and those engaged therein

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[5] Act of July 2, 1940, c. 508, 54 Stat. 712.

were subject to the Act. The case is here on certiorari, 333 U. S. 841.

The Silas Mason Company, in a sense, is no more than a nominal defendant, for it is entitled to reimbursement from the Government. The Government, the ultimate party in interest, appears through the Department of Justice in support of the statutory basis for the claims against itself. But it advises us that "The Department of the Army is of the view that respondent's position has merit for the reasons set forth in the brief filed by respondent. The Army is concerned with the great cost to which the Government will be subjected if the numerous suits akin to this are lost, or even if it must bear the cost of defending them. Furthermore, the Army believes that the classes of employees involved in these cases were well paid, that they accepted their compensation without complaint or expectation of receiving more until this litigation was commenced sometime after the termination of their employment, and that accordingly there is little equity in the employees' present position."

Three Acts of Congress require consideration. The plaintiffs and the Government say the Fair Labor Standards Act is controlling. The defendant, the Department of the Army, which handled the transaction, and the District Court consider that the Act of July 2, 1940, controls the liability. But the trial court held it cannot be the basis of adjudication of plaintiffs' claims because no such issue was pleaded and that holding has become the law of the case since there has been no appeal. The plaintiffs pleaded their cause of action also under the Walsh-Healey Public Contracts Act,[6] but it was held unavailable to them below and their petition for certiorari

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[6] Act of June 30, 1936, c. 881, 49 Stat. 2036, 41 U. S. C. § 35.

to this Court raises no question as to that Act and acquiesces in dropping it from our consideration.

On the question as to who was the employer, on which this case was decided below, the complaint makes a clear, factual and simple allegation. It says that these plaintiffs were employed by the corporate defendant itself. This allegation has been overborne by interpreting the terms of the contracts between that alleged employer and a third party, that is, the Government, which terms may or may not have been known to the employees. There is substantial controversy as to the way those two parties, the Government and defendant in actual practice, construed their contracts, both sides of the controversy being based on events of which we are asked to take judicial notice or to spell out from contracts without the tests which trial affords. The plaintiffs in turn seek to counteract whatever inferences may be drawn from the defendant's version of dealings between defendant and the Government by contrary inferences from dealings between employees and the defendant. But they do not prove plaintiffs' own dealings, which are not in the record, but offer affidavits which relate specifically to "laborers and mechanics" while plaintiffs were inspectors and foremen, a difference that may be material. Insofar as the allegations of the complaint are impeached by the course of dealing between defendant and the Government, they are not supported by any course of dealing to which these plaintiffs were parties. What they were paid and on what basis, whether they have already been paid for overtime on the theory that one of the other Acts applies, we do not know.

Defendant's present position, which, for all we know, may or may not be shared by the Department of the Army, is that we do not need to settle the question as to whether defendant or the Government was the actual

employer, that the effect of the war-time legislation was to set up a wholly new system of war production, which was neither private enterprise nor government operation, but an amalgamation of the two, which also prescribed a complete system of labor relation by statute which supersedes and precludes operation of the Fair Labor Standards Act. But this broad contention seems not to have been submitted to either court below, is not consistent with the theoretical basis of their decisions and appears fully presented for the first time in the reply brief in this Court.

The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues

are clear-cut and simple,[7] present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions.

Judgments vacated.

MR. JUSTICE BLACK thinks the judgment should be reversed.

MR. JUSTICE DOUGLAS concurs in the result.

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[7] Rule 56 requires that summary judgment shall be rendered if "there is no genuine issue as to any material fact . . . ." See note 4.

UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 527. Argued April 19–20, 1948.—Decided May 24, 1948.

After a circuit court of appeals has heard and determined an appeal in an antitrust case certified to it by this Court under the Act of June 9, 1944 (because of want at the time of a quorum of Justices of this Court qualified to participate in the consideration of the case), the circuit court of appeals has jurisdiction to issue a writ of mandamus to compel the district court to comply with its mandate—even though the term during which the circuit court of appeals issued its mandate to the district court has expired and even though it be assumed *arguendo* that all further appeals in the case would come to this Court. Pp. 259–265.

(a) The broad power conferred upon the federal courts by § 262 of the Judicial Code includes the power to issue a writ of mandamus either in exercise of appellate jurisdiction or in aid of appellate jurisdiction. P. 263.

(b) The fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future, but only a past, appellate jurisdiction to which it can relate. P. 263.

(c) A high function of mandamus is to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court. P. 264.

(d) The Act of June 9, 1944, gave the circuit court of appeals the full amplitude of judicial power to deal with a cause certified to it thereunder—even though it be assumed *arguendo* that any further appeals in the case would come to this Court. Pp. 264–265.

164 F. 2d 159, reversed.

The Circuit Court of Appeals dismissed a petition for a writ of mandamus to require the District Court to vacate a portion of its judgment in an antitrust case certified by this Court to the Circuit Court of Appeals under the Act of June 9, 1944, 58 Stat. 272, and remanded by

the latter to the District Court. 164 F. 2d 159. This Court granted certiorari, 333 U. S. 841. *Reversed,* p. 265.

Leonard J. Emmerglick argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett* and *Robert L. Stern.*

William Watson Smith argued the cause for respondents. With him on the brief were *Frank B. Ingersoll, Leon E. Hickman, Charles E. Hughes, Jr.* and *L. Homer Surbeck.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United States brought a proceeding against the Aluminum Company of America (Alcoa) and others to prevent and restrain certain violations of the Sherman Act. 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, 4. After trial the District Court dismissed the complaint. 44 F. Supp. 97. The case came here by appeal, after which we ascertained that due to the disqualification of four Justices to sit in the case, we were without a quorum. Accordingly, we transferred the case to a special docket and postponed further proceedings in it until such time as there was a quorum of Justices qualified to sit in it. 320 U. S. 708. Thereafter Congress amended the statute which provides for a direct appeal to this Court from the District Court in antitrust cases. The Act of June 9, 1944, c. 239, 58 Stat. 272, 15 U. S. C. (Supp. V, 1946) § 29, passed to meet the contingency of the lack of a quorum here, provides: [1]

> "In every suit in equity brought in any district court of the United States under any of said Acts,

[1] See H. R. Rep. No. 1317, 78th Cong., 2d Sess.; Sen. Rep. No. 890, 78th Cong., 2d Sess.

wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise.

"If, by reason of disqualification, death or otherwise, any of said three circuit judges shall be unable to participate in the decision of said case, any such vacancy or vacancies shall be filled by the senior circuit judge by designating one or more other circuit judges of the said circuit next in order of seniority

and, if there be none such available, he shall fill any such vacancy or vacancies by designating one or more circuit judges from another circuit or circuits, designating, in each case, the oldest available circuit judge, in order of seniority, in the circuit from which he is selected, such designation to be only with the consent of the senior circuit judge of any such other circuit.

"This Act shall apply to every case pending before the Supreme Court of the United States on the date of its enactment."

Thereupon we certified the cause to the Circuit Court of Appeals for the Second Circuit. 322 U. S. 716. That court heard the case, sustained charges of monopoly against Alcoa, reversed the judgment of dismissal, and remanded the cause for further proceedings not inconsistent with its opinion. 148 F. 2d 416. It left open the question of the remedies to be applied. Nearly five years had passed since the evidence was closed, war had intervened, new plants had been constructed by the government, and their disposition under the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. § 1611, would affect the competitive situation in the ingot market. Petitioner had asked for Alcoa's dissolution. But that question was deferred until Alcoa's position in the industry after the war was known. 148 F. 2d pp. 445–447.

On remand of the cause the District Court entered its judgment on the mandate on April 23, 1946. It enjoined certain practices and retained jurisdiction of the cause until after the Surplus Property Administrator shall have proposed a plan for disposition of the government-owned aluminum plants or facilities, in order that the Attorney General might institute proceedings for the dissolution or partial dissolution of Alcoa or for the enforcement of such plan if it will establish competitive conditions

in the industry or for such other relief as will establish them; "and for the purpose of enabling Aluminum Company to apply to this court for a determination of the question whether it still has a monopoly of the aluminum ingot market in the United States."

Pursuant to the quoted provision Alcoa filed a petition in the District Court praying that a final judgment be entered adjudicating that it no longer has a monopoly of the aluminum ingot market in the United States and that as a consequence competitive conditions in the industry have been restored. The motion of the United States to dismiss the petition was denied and the question whether Alcoa still had a monopoly was set for trial. The United States thereupon filed a petition for a writ of mandamus in the Circuit Court of Appeals to require the district judge to vacate so much of its judgment of April 23, 1946, as reserved jurisdiction to enable Alcoa to apply for a determination whether it still has a monopoly, and to dismiss the petition of Alcoa.

The Circuit Court of Appeals dismissed the petition for mandamus. 164 F. 2d 159. The case is here on a petition for a writ of certiorari which we granted to settle the important question under the Act.

The Circuit Court of Appeals concluded that its power to issue the writ of mandamus exists only as an incident to its jurisdiction to entertain an appeal from a judgment of the District Court. It read the Act of June 9, 1944, as confining its jurisdiction to the determination of the appeal which it had heard under our certificate. Moreover, control over its mandate ended with the end of the term during which the mandate went down.[2] The court therefore concluded that it had no power to issue the writ.

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[2] The term of court in which the mandate issued expired September 30, 1945, on which day the court lost power to change it except as to matters of form. See *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70.

We put to one side the question whether another appeal in the case would be decided by the Circuit Court of Appeals or by this Court, now that there is a quorum of Justices qualified to sit in it. No matter how that question were resolved, it is our opinion that the Circuit Court of Appeals has jurisdiction in this mandamus proceeding.

Section 262 of the Judicial Code, 28 U. S. C. § 377, provides that the federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. See *Marbury* v. *Madison,* 1 Cranch 137, 175; *Ex parte Crane,* 5 Pet. 190. That power protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved. *McClellan* v. *Carland,* 217 U. S. 268. *Ex parte United States,* 287 U. S. 241, 246. In that category will often fall cases involving issuance of mandamus requiring the lower court to enforce the judgment of the appellate court. *Delaware, L. & W. R. Co.* v. *Rellstab,* 276 U. S. 1, 5.

But the fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate. Cf. *Chickaming* v. *Carpenter,* 106 U. S. 663, 665. *In re Washington & Georgetown R. Co.,* 140 U. S. 91, is a case in point. The lower court in violation of the mandate of this Court allowed interest on a judgment. The amount of the interest was too small to be the subject of a writ of error from this Court. It was held that mandamus

was the proper remedy to enforce compliance with the mandate. And see *City Bank* v. *Hunter,* 152 U. S. 512, 515. It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court. *Delaware, L. & W. R. Co.* v. *Rellstab, supra.* That function may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one. When Congress authorized "the case" to be certified to the Circuit Court of Appeals, it excepted none of the powers of that court which might be brought to bear on the litigation. Those powers include the power to issue mandamus to protect the mandate of the Circuit Court of Appeals, even though we assume *arguendo* that all further appeals in the case would come here.

The Circuit Court of Appeals seems to have been influenced to the other view by the feeling that the question presented by the mandamus cuts so wide a swathe in the litigation that it should hold its hand. Its position was that the issue raised by the petition for mandamus had an important relation to the reserved problem of dissolution, that the judgment on dissolution would in its view eventually come here on appeal, that any ruling by it on the mandamus would therefore limit our freedom to deal with the dissolution issue as, if, and when it got here.

Those considerations may be of large importance in the totality of this proceeding, once we accept the premise of the Circuit Court of Appeals that it will have nothing to do with any other appeals in the case. But they do not seem to us germane to the question whether the Circuit Court of Appeals has the power to enforce obedience to its mandate. We think the Act of June 9, 1944, gave the Circuit Court of Appeals the full amplitude of judicial power to deal with the cause which we certified. That power does not contract with the importance or gravity

of the question presented. The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it, not on the collateral repercussions which enforcement may entail.

Reversed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

When this case originally came here by appeal, an extraordinarily rare, if not unique, situation in the history of the Court precluded its consideration for want of a qualified quorum. The impasse was met by the special jurisdictional Act of June 9, 1944, 58 Stat. 272, 15 U. S. C. § 29. For reasons that seem to me too obvious to need spelling out, that Act should be interpreted as transferring to the Circuit Court of Appeals *the case* and not merely a stage in its disposition if the Congressional language reasonably permits the Act to be so read. Since it can be so read I do so read it and conclude that the whole appellate process in this case was vested in the Circuit Court of Appeals, regardless of the piecemeal exercise of that process. I find such a construction of the Act of June 9, 1944, freer from difficulties than some of the technical questions pertaining to mandamus that arise on the view taken by the Court.

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PRICE *v.* JOHNSTON, WARDEN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 111. Argued December 16, 1947.—Decided May 24, 1948.

1. Under § 262 of the Judicial Code, a circuit court of appeals has power, exercisable in the sound discretion of the court, to issue an order, in the nature of a writ of habeas corpus, commanding that a prisoner be brought before the court for the purpose of arguing his own appeal in a case involving his life or liberty. Pp. 278–286.

(a) An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in the nature of a writ of habeas corpus; and, as such, clearly falls within the scope of § 262. P. 279.

(b) Such an order satisfies the basic requirement of § 262 that it be necessary to the complete exercise by the court of an appellate jurisdiction already existing. P. 279.

(c) A writ of habeas corpus of this nature is not limited to circumstances where "necessary" in the sense that the court could not otherwise physically discharge its appellate duties, but is available in those exceptional cases where its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice. P. 279.

(d) Since ordinarily a court can not designate counsel for a prisoner who has no lawyer and who desires that none be appointed to represent him, an arrangement in such case for the prisoner's presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." P. 280.

(e) The forms of the habeas corpus writ authorized by § 262 are not only those which were recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. P. 282.

(f) Where production of a prisoner before an appellate court is essential to proper disposition of the case on appeal, issuance of a writ of habeas corpus for that purpose is "agreeable to the usages and principles of law" within the meaning of § 262. Pp. 281–284.

2. The power to issue such a writ is discretionary; and this discretion is to be exercised with the best interests of both the prisoner and the Government in mind. P. 284.
3. The right given by § 272 of the Judicial Code to parties in all the courts of the United States to "plead and manage their causes personally" is not unqualified as to prisoners desiring to conduct their own oral arguments in appellate courts and may be circumscribed as to them where reasonable necessity so dictates. Pp. 285–286.
4. After three unsuccessful attempts by habeas corpus proceedings to secure release from allegedly unlawful imprisonment, petitioner instituted a fourth proceeding, alleging for the first time that the prosecution had knowingly used false testimony to obtain his conviction. Without denying this allegation or questioning its sufficiency, the Government asked that the fourth petition be denied, apparently on the ground that the issues raised were known to the petitioner when he filed the earlier petitions and that the fourth petition was an abuse of the writ of habeas corpus. Without a hearing and without stating any reasons for its action, the District Court dismissed the fourth petition. *Held:* It erred in so doing and the cause is remanded to it for further proceedings. Pp. 269–278, 286–294.

   (a) Since the three prior applications did not raise the issue as to the prosecution knowingly using false testimony to obtain petitioner's conviction, the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Salinger* v. *Loisel*, 265 U. S. 224, and *Wong Doo* v. *United States*, 265 U. S. 239, distinguished. Pp. 287–290.

   (b) Although the record in the proceeding upon petitioner's first petition for habeas corpus indicates that petitioner then had knowledge of the facts which form the basis, at least in part, of the due process allegation made in the fourth petition, it can not be assumed that petitioner has acquired no new or additional information, since the time of the first proceeding, that might indicate fraudulent conduct on the part of the prosecuting attorneys. P. 290.

   (c) Whether petitioner does or does not have any new information is a matter which should be determined in the first instance by the District Court, and on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. P. 291.

(d) Assuming that petitioner did have prior knowledge of all the facts upon which the allegation in question is based, it does not necessarily follow that the fourth petition should be dismissed, since he may have excuse for failure previously to assert his rights. P. 291.

(e) The burden was not on the petitioner to allege affirmatively in the first instance that he had acquired new information or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Pp. 291–292.

(f) There can not be imposed on unlearned prisoners who act as their own counsel in habeas corpus proceedings the same high standards of the legal art which may be demanded of members of the legal profession, especially where the imposition of such standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. P. 292.

(g) If the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner had abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. P. 292.

(h) Once a particular abuse of the writ has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ; and if the answer is inadequate, the court may dismiss the petition without further proceedings. P. 292.

(i) If there is a substantial conflict, a hearing may be necessary to determine the facts, and appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the District Court's action, and the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition. P. 292.

(j) The procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ and did not give petitioner a fair opportunity to meet this important issue. P. 293.

159 F. 2d 234 and 161 F. 2d 705, reversed.

Petitioner's fourth petition for a writ of habeas corpus was denied by the District Court. On appeal, the Circuit Court of Appeals *en banc* denied petitioner's motion

for an order directing his appearance for the purpose of orally arguing his case, 159 F. 2d 234, and affirmed the judgment of the District Court, 161 F. 2d 705. This Court granted certiorari. 331 U. S. 804. *Reversed and remanded,* p. 294.

Joseph L. Rauh, Jr. argued the cause for petitioner. With him on the brief was *Irving J. Levy.*

Frederick Bernays Wiener argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg.*

Wayne M. Collins filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Mr. Justice Murphy delivered the opinion of the Court.

The writ of *habeas corpus* has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. But in recent years the increased use of this writ, especially in federal courts, has created many procedural problems which are not easy of solution. This case involves some of those problems. Because of the importance of the writ and the necessity that it not lose its effectiveness in a procedural morass, we have deemed it wise to deal with this case at length and to set forth fully and explicitly the answers to the matters at issue.

In 1938, petitioner was convicted in a federal district court in Michigan under a four-count indictment charging violations of the federal bank robbery statute.[1] He was sentenced to imprisonment for 65 years and was com-

[1] 12 U. S. C. §§ 588b and 588c. Petitioner was charged with having (1) entered a federally insured bank with intent to rob, (2) robbed the bank by putting an employee in fear, (3) jeopardized

mitted to the United States Penitentiary at Alcatraz, California. His efforts to prosecute an appeal from his conviction proved futile.[2]

Since his confinement at Alcatraz, petitioner has made four separate applications for writs of *habeas corpus* in the United States District Court for the Northern District of California. The instant proceeding involves the fourth of these applications. Inasmuch as the problems in this case can best be understood in light of the issues raised in the earlier proceedings, it becomes necessary to examine the various applications in some detail.

1. The first application was prepared and filed in 1940 by petitioner, who is not a lawyer. He sought release mainly on the grounds that certain evidence used against him at the trial had been obtained in violation of the Fourth Amendment and that the trial judge had improperly refused to disqualify himself upon the filing of an affidavit of prejudice. It is important to note that this application did not allege that the conviction resulted from the prosecution's knowing use of false testimony. The District Court issued an order to show cause, a return was made, and the petitioner then filed a traverse in the form of a "Motion to overrule Respondent's return and issue writ." This motion likewise failed to aver the knowing use of false testimony. But it did call

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the lives of a bank employee and others by the use of a dangerous weapon, and (4) kidnapped a bank employee in the course of such offense. Petitioner was found guilty as charged.

[2] His petition to the Sixth Circuit Court of Appeals for a writ of mandamus to require the trial judge to enter a decision on his application for an appeal was denied because "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan." *Price* v. *Moinet*, 116 F. 2d 500. His petition in this Court for a writ of certiorari was denied because filed out of time, 311 U. S. 703; rehearing denied, 311 U. S. 729. Petitioner acted as his own counsel in these unsuccessful maneuvers.

the court's attention to "two different statements" made at the trial by the prosecution's chief witness, Fred T. Donner, and to the "methods . . . used to obtain" this change in testimony.[3] There was no indication given as to what those "methods" were. Donner's testimony at the trial was attached as an exhibit, testimony which revealed that Donner had gone to the office of the District Attorney and talked to him and his assistant during the interval between the allegedly conflicting statements.[4]

The District Court then appointed counsel for petitioner at his request. Several months later, when the

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[3] Point V of petitioner's motion stated: "Because the respondent shows falsely on the affidavit by Assistant United States Attorney John W. Babcock, respondent's Exhibit 'A', where he states that there was no determination of any one in said office of the United States Attorney to have him convicted falsely. Petitioner calls the attention of this Honorable Court to the testimony of transcript of record at page 35 Second part. Recross examination of the one and only witness that the government produced to testify that there had been a crime committed as charged in indictment #24629. Petitioner's Exhibit 'A', testimony given by Fred T. Donner, and it will show just what methods was used to obtain two different statements from this witness."

[4] This testimony was brought out on recross examination of Donner by one of petitioner's attorneys. Part of this colloquy was as follows:

"Q. Witness, perhaps I misunderstood your testimony this morning. Did I understand you correctly to say that last night after you left here, you went up to the department of Justice, or the District Attorney's office, and you discussed your testimony?

"A. Yes, sir.

"Q. And whom did you discuss it with?

"A. With the District Attorney, and the assistant.

"Q. And after that discussion, you remembered some things that you have testified to this morning?

"A. I remembered them yesterday, but I just—I was nervous and forgot them.

. . . . . .

"Q. Well, my recollection and yours perhaps do not agree on it, but

matter came on for determination, the court entered an order denying the application for a writ of *habeas corpus* and dismissing the petition. No hearing was held, the order being entered solely on the basis of the pleadings. And no findings of fact or conclusions of law were made. Nor was an opinion written. Petitioner thereafter proceeded *pro se*. Among his various legal maneuvers, he moved for a rehearing. He stated, as grounds for the motion, that the court erred in refusing to allow him to appear and testify personally before entering the order and that the court-appointed attorney "blocked your petitioner from filing an amended petition to include additional points so that they could be reviewed on appeal." This motion was denied.

Petitioner prepared his own appeal to the Circuit Court of Appeals. Among the points upon which he stated he intended to rely was the claim that he had been denied "a fair and impartial trial" by Donner's change in testimony after talking with the District Attorney. But the Circuit Court of Appeals, in affirming the District Court's disposition of the *habeas corpus* petition, made no reference to this point; its opinion was devoted exclusively to the matters raised in the original petition. *Price* v. *Johnston*, 125 F. 2d 806.

Included in the numerous claims in his attempt to secure a writ of certiorari in this Court was the reiteration that Donner's change in testimony deprived him of a fair

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the statements that you made yesterday were all true to the best of your recollection, were they not?

"A. Yes, sir.

"Q. And your conversations last night after you left the court didn't assist you in giving any testimony, did they?

"A. No, it did not, only that I had an opportunity, I wanted an opportunity to bring out something that I hadn't said.

"Q. Did it refresh your recollection?

"A. No, it just—there were just some things I didn't tell in my story, that is all."

and impartial trial. According to his written argument, "if this was not perjured it was base contradictory evidence for after this witness had completed all his evidence he was then taken into the private chambers of the United States Attorney . . . and there was instructed as to what to say, for he came from said office and was recalled to the stand at this second setting he rebutted all his prior testimony. This must be either classed as a conspiracy forcing a witness to change his testimony either of which surely would not be giving the appellant the fair and impartial trial to which he is entitled." The Government's memorandum in opposition dealt with this contention in a footnote. It was there said that petitioner's claim "is refuted by the excerpt from the transcript of the proceedings at the trial introduced as part of petitioner's pleadings. . . . The witness did not rebut his prior testimony but merely supplemented it with a few more details and he affirmatively stated that his discussion with the prosecutor did not assist him in his subsequent testimony." This Court denied the petition for a writ of certiorari. *Price* v. *Johnston,* 316 U. S. 677; rehearing denied, 316 U. S. 712.

2. In 1942, several months after the foregoing action by this Court, petitioner prepared and filed in the District Court a second petition for a writ of *habeas corpus.* In this petition he sought release on the same grounds set forth in his first petition as well as on two principal additional grounds. The two new claims were that petitioner's counsel had been absent from the courtroom during an important part of the trial and that petitioner had not had counsel at the preliminary hearing before the United States Commissioner. The petition, as amended, contained no allegation that false testimony had been knowingly used at the trial; nor did it refer in any way to Donner's allegedly inconsistent testimony. Moreover, no mention of such matters was made by petitioner

in his testimony at the hearing on the writ of *habeas corpus*.[5]

The District Court, at the close of the hearing, discharged the writ. Its findings of fact and conclusions of law were subsequently entered and were silent as to any question relating to the knowing use of false testimony. The District Court's action was affirmed on appeal, the opinion of the Circuit Court of Appeals being devoted to the matters decided by the District Court. *Price* v. *Johnston,* 144 F. 2d 260. This Court then denied a petition for certiorari, a petition which presented no issues differing from those raised in the lower courts. *Price* v. *Johnston,* 323 U. S. 789; rehearing denied, 323 U. S. 819.

3. Petitioner's third petition for a writ of *habeas corpus* was denied by the District Court on August 22, 1945. This denial was based on the ground that the issues raised were known to petitioner when he filed the earlier petitions, making the third petition an abusive use of the writ of *habeas corpus*. *Price* v. *Johnston,* 61 F. Supp. 995.[6] Leave to appeal was denied. It is not evident, however, what the issues were that petitioner did raise in this proceeding.

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[5] The lawyer who had represented petitioner in connection with the first application withdrew and another was appointed in his place by the District Court to serve petitioner in the second proceeding. This lawyer filed an amended petition for the writ of *habeas corpus*. The writ issued, there was a hearing at which petitioner's counsel was present, a further amendment of the petition was allowed, and testimony was taken. Petitioner gave evidence on his own behalf at this hearing. In prosecuting his appeal from the District Court's action, petitioner once more acted *pro se*.

[6] The District Court's opinion, after briefly stating the background of the case, reads as follows:

"Petitioner alleges 'that the questions now raised was not raised in the prior petitions No. 23268–W and 10.671.R.' However, these matters were known to petitioner when he filed the petitions in 23268–W and 23721–R. If petitioner intended to rely on these

4. On January 2, 1946, petitioner filed his fourth application for a writ of *habeas corpus*. He alleged that he had been denied a fair and impartial trial in that, on the trial for bank robbery, the jury was confused by the presentation of evidence to show perjury before a notary public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that the fourth count did not allege an offense. After an order to show cause was issued, petitioner amended his petition to allege "That the government knowingly employed false testimony on the trial, to obtain the conviction."

The respondent warden, through the United States Attorney, thereupon filed his return to the order to show cause. This return did not deny the allegation that the Government knowingly employed false testimony at the trial. Nor did it question the sufficiency of the allegation or the absence of supporting facts. It simply incorporated by reference the entire record in the three prior *habeas corpus* proceedings and asked that the fourth petition be denied on the basis of the District Court's opinion denying the third application.[7] Petitioner's trav-

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matters he should have urged them in 23268–W. 'To reserve them for use in a later proceeding "was to make an abusive use of the writ of habeas corpus." ' Swihart v. Johnston, 9 Cir., 1945, 150 F. 2d 721.

"Since upon the face of the petition petitioner is not entitled to the writ, Walker v. Johnston, 312 U. S. 275, 284 . . . the petition for writ of habeas corpus is denied."

[7] The Government's memorandum of points and authorities, filed with the return, merely quoted the District Court's opinion denying the third petition for a writ of *habeas corpus, Price* v. *Johnston*, 61 F. Supp. 995 (see footnote 6, *supra*). The memorandum then concluded: "Respondent, in reliance on the decision of Judge St. Sure and the authorities which he cites, respectfully urges that the petition for writ of habeas corpus should be denied and the order to show cause, heretofore issued, discharged."

erse stated that the earlier petitions did not contain some of the points presented in the fourth petition. It repeated the allegations in the original petition, though it merely incorporated by reference the allegation of the amended petition that the prosecutor knowingly used false testimony.

The District Court denied the fourth petition without a hearing and without opinion. It is difficult to discover from such action the precise basis of the District Court's dismissal of the allegation in question. But because of the nature of the warden's return, we suspect that the court thought that the matter was known to petitioner at the time of filing the first petition and should have been urged at that time. There is nothing whatever to indicate that the dismissal stemmed from the court's belief that the allegation was insufficient on its face or that it was obviously without merit.

On appeal, a panel of the Ninth Circuit Court of Appeals ordered up the original files in petitioner's three previous applications and directed that petitioner be brought before the court for the argument of his appeal. After the argument, the submission of the cause was set aside and the case was assigned for hearing before the court *en banc*. Petitioner then moved the court *en banc* for an order directing his appearance for the reargument. This motion was denied on January 6, 1947. In its written opinion, a majority of the court held that circuit courts of appeals are without power to order the production of a prisoner for the argument of his appeal in person. One judge expressed the view that the court had such power, but concurred in the denial of the motion as a matter of discretion. Two judges dissented, stating that there was power to grant the requested relief; but they did not reach the question of the propriety of exercising that power in this case. 159 F. 2d 234.

The appeal was then considered on the merits on briefs filed by petitioner and respondent [8] and on oral argument by an Assistant United States Attorney. Petitioner was unrepresented at the oral argument. On May 5, 1947, the order of the District Court denying the fourth petition without a hearing was affirmed, two judges dissenting in separate opinions. 161 F. 2d 705.

The majority opinion of the Circuit Court of Appeals pointed out that, by amending his fourth petition to allege "that the government knowingly employed false testimony on the trial, to obtain conviction," petitioner had interposed a wholly new ground for discharge. But the specific circumstances of this claim had not been developed in the District Court. The opinion accordingly treated the allegation as though it had incorporated petitioner's explanatory statement in his appellate brief that the United States Attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first."

So construing the allegation, the court then said: "The records in these several proceedings disclose that throughout his trial appellant was represented by counsel of his

[8] The Government's brief in the Circuit Court of Appeals again was devoted solely to a quotation of the District Court's opinion denying the third petition. See footnote 7, *supra*. It concluded with the following statement: "Appellee is in accord with the reasoning of Judge St. Sure and the authorities cited in his memorandum and order denying appellant's third application for a writ of habeas corpus, and hereby adopts them *in toto* as his argument on this appeal to sustain the Court below in its decision denying appellant's fourth application for a writ of habeas corpus in our case at bar."

own choosing. And since he was himself present at all times he could hardly have been unaware of the described incident or of its implications, nor does he make any such claim. On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions." 161 F. 2d at 706–707. And it was further stated that "Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ." *Id.*, at 707. Since petitioner had given no valid excuse for failing to present earlier the allegation in question, the conclusion was reached that the District Court did not abuse its discretion in denying the fourth petition without a hearing. Reference was made in this respect to *Salinger* v. *Loisel,* 265 U. S. 224, and *Wong Doo* v. *United States,* 265 U. S. 239.

We issued a writ of certiorari to review the important issues thus raised in the two opinions of the Circuit Court of Appeals. And on petitioner's motion, we appointed a member of the bar of this Court to serve as his counsel before us.

I.

We hold that power is resident in a circuit court of appeals to command that a prisoner be brought before it so that he may argue his own appeal in a case involving his life or liberty. That power, which may be exercised at the sound discretion of the court, grows out of the portion of § 262 of the Judicial Code, 28 U. S. C. § 377, which provides that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective juris-

dictions, and agreeable to the usages and principles of law."

An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in the nature of a writ of *habeas corpus*. As such, it clearly falls within the scope of § 262. Basic to the power of a circuit court of appeals to issue a writ of *habeas corpus* under that section, of course, is the pendency of a proceeding of an appellate nature to which the contemplated writ is auxiliary. *Whitney* v. *Dick*, 202 U. S. 132. The writ cannot be issued by that court as an independent and original proceeding; it can only issue where it may be necessary to the complete exercise of an appellate jurisdiction already existing. Since the occasion for demanding the presence of a prisoner at an oral argument would arise only where there was an appeal already pending before the court, a writ compelling his presence satisfies this basic requirement of § 262.

Moreover, a writ of *habeas corpus* of this nature can on occasion be "necessary" for the exercise of appellate jurisdiction so as to be authorized by § 262. We have refused to interpret that section to mean that a circuit court of appeals can issue a *habeas corpus* writ only if "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273. Rather, § 262 has been read so that the writ may be issued where its use is calculated, in the sound judgment of the circuit court of appeals, to achieve the ends of justice entrusted to it. In other words, the writ is available in those exceptional cases "where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice." *Id.*, at 274.

Exceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is "reasonably necessary in the interest of justice." True, an appeal can always be submitted on written briefs. But oral argument, while not indispensable, is frequently if not usually desired by the parties. And there are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person. The difficulty, of course, arises when one of the parties is a prisoner who has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues. Since ordinarily the court cannot designate counsel for the prisoner without his consent, an arrangement that is made for his presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." Otherwise the court loses the benefits of listening to his contentions, hearing only the arguments of government counsel. Conceivably, the prisoner's case might be unduly prejudiced by such a one-sided debate. That the argument orally advanced by the prisoner may in fact be less than enlightening to the court does not detract from the fairness or the justness of giving him the opportunity to appear and argue. Thus if a circuit court of appeals is satisfied in other respects that the prisoner should be produced at the argument, a writ designed to effectuate that production is plainly "necessary" within the contemplation of § 262.

It remains to be seen whether a writ of *habeas corpus* for the purpose under consideration is "agreeable to the usages and principles of law," as that phrase is used in § 262. At common law there were several variants of the writ of *habeas corpus*. See 3 Blackstone's Commentaries *129–132; *Ex parte Bollman*, 4 Cranch 75, 97–98.[9] None of them, however, seems to have been devised for the particular purpose of producing a prisoner to argue

[9] Blackstone describes the following common law versions of the *habeas corpus* writ:

(1) *Habeas corpus ad respondendum.* Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."

(2) *Habeas corpus ad satisfaciendum.* Issued "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

(3) *Habeas corpus ad prosequendum, testificandum, deliberandum,* etc. Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

(4) *Habeas corpus ad faciendum et recipiendum.* This "issues out of any of the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa,*) to *do and receive* whatsoever the king's court shall consider in that behalf."

(5) *Habeas corpus ad subjiciendum.* The "great and efficacious writ," which is "directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."

Chief Justice Marshall examines the first four of these writs in their relation to the American judicial system in *Ex parte Bollman*, 4 Cranch 75, 97–98.

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his own appeal. Nor does it appear that the courts of England have used or developed the *habeas corpus* writ for this purpose.[10]

However, we do not conceive that a circuit court of appeals, in issuing a writ of *habeas corpus* under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of "law," a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read § 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve "the rational ends of law." *Adams* v. *United States ex rel. McCann, supra,* 273.

We accordingly look to the usages and principles which have attached themselves to the writ of *habeas corpus*

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[10] The courts of England have long considered themselves powerless to issue a *habeas corpus* writ to enable a prisoner to defend himself in another proceeding or to argue motions in the trial court. *Benns* v. *Mosley,* 2 C. B. (N. S.) 116; *Weldon* v. *Neal,* 15 Q. B. D. 471. See also *Attorney General* v. *Hunt,* 9 Price 147; *Ford* v. *Nassau,* 9 M. & W. 793; *Rex* v. *Parkyns,* 3 B. & Ald. 679; *Attorney General* v. *Cleave,* 2 Dowl. P. C. 668; *Ex parte Cobbett,* 3 H. & N. 155; *Clark* v. *Smith,* 3 C. B. 982. But the specific problem of whether a prisoner can be produced to argue in person his own appeal under circumstances like those present in the instant case does not appear to have a precise answer in English law.

down through the years to the present time. The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause. The most important result of such usage has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty. With that usage, a writ for the purpose under consideration is entirely agreeable and consistent. To order the production of a prisoner before an appellate court to argue his own appeal in a case in which he alleges that he is illegally imprisoned is to perform an act which is intimately and necessarily related to the presentation of the merits of the prisoner's complaint, a presentation which is essential if relief from the allegedly illegal imprisonment is to be secured. Such production, as we have seen, may in some circumstances be essential to the proper disposition of the case on appeal. Where that is the case, a writ in the nature of *habeas corpus* to achieve that production is agreeable to the usages of law.

Moreover, the principle has developed that the writ of *habeas corpus* should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. The fluidity of the writ is especially desirable in the setting of a statute where Congress has given circuit courts of appeals the power to issue the writ in aid of their appellate jurisdiction wherever "reasonably necessary in the interest of justice." The ordinary forms and purposes of the writ may often have little relation to the necessities of the appellate jurisdiction of those courts. Justice may on occasion require the use of a variation or a modification

of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in § 262. It follows that we should not write in limitations which Congress did not see fit to make.

Formulation of the limitations of § 262 which do exist must await the necessities of appellate jurisdiction in particular cases. It is enough for the present to note that where those necessities are such as to require the presence of a prisoner to argue his own appeal, the issuance of a writ of *habeas corpus* for that purpose is "agreeable to the usages and principles of law" so as to be sanctioned by § 262. Only in that way can we give substance in this case to our previous statement that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams* v. *United States ex rel. McCann, supra,* 274.

We therefore conclude that circuit courts of appeals do have the power under § 262 of the Judicial Code to issue an order in the nature of a writ of *habeas corpus* commanding that a prisoner be brought to the courtroom to argue his own appeal. That power has heretofore been assumed. *Schwab* v. *Berggren,* 143 U. S. 442, 449; and see *Goldsmith* v. *Sanford,* 132 F. 2d 126, 127; *Donnelly* v. *State,* 26 N. J. Law 463, 472, affirmed, 26 N. J. Law 601. We now translate that assumption into an explicit holding.

In so deciding, however, we emphasize that the power of a circuit court of appeals to issue such a writ is discretionary. And this discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the

prison,[11] that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced. Section 262, in other words, does not justify an indiscriminate opening of the prison gates to allow all those who so desire to argue their own appeals.

The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. *Schwab* v. *Berggren, supra.* The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution,[12] see *Hopt* v. *Utah,* 110 U. S. 574, and *Snyder* v. *Massachusetts,* 291 U. S. 97, and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U. S. C. § 394, to parties in all the courts of the United States to "plead and manage

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[11] The Circuit Court of Appeals below felt that the production of prisoners to argue their own appeals might lead to "the widespread abuse of the writ . . . , not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls." 159 F. 2d at 237.

[12] But see *Bell* v. *United States,* 129 F. 2d 290; *Barber* v. *United States,* 142 F. 2d 805.

their own causes personally." To the extent that this section permits parties to conduct their own oral arguments before appellate courts, it must be modified in its application to prisoners. Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

A prisoner's right to participate in oral argument on appeal is accordingly to be determined by the exercise of the discretionary power of the circuit court of appeals under § 262. The court below erred in holding that no such power existed. But since the case must go back to the District Court for further proceedings, it is unnecessary here to remand the case to the Circuit Court of Appeals to exercise the discretionary power which rightfully belongs to it.

II.

We hold that petitioner's fourth petition for a writ of *habeas corpus,* alleging the knowing use of false testimony to obtain his conviction, was improperly dismissed by the District Court.

The Government argues before us that the allegation in question, as presented to the District Court, is a mere allegation of law unsupported by reference to any specific facts. As such, the allegation is said to be fatally deficient and to warrant summary denial. Reference is made in this respect to *Cuddy, Petitioner,* 131 U. S. 280, 286; *Kohl* v. *Lehlback,* 160 U. S. 293, 299; *United States* v. *Ju Toy,* 198 U. S. 253, 261; *Collins* v. *McDonald,* 258 U. S. 416, 420–421; *Hodge* v. *Huff,* 78 U. S. App. D. C. 329, 331, 140 F. 2d 686, 688; and *Long* v. *Benson,* 140 F. 2d 195, 196.

But this proposition was apparently not presented to or passed upon by the District Court; nor was it deter-

mined by the Circuit Court of Appeals. The sole complaint made by the Government in the lower courts, and the main one raised before us, relates to petitioner's alleged abuse of the writ of *habeas corpus*. A consideration of that factor is preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself. We accordingly address ourselves solely to the alleged abuse of the writ, leaving the Government free to press its objections to the adequacy of the allegation after the proceedings are renewed before the District Court.

The Circuit Court of Appeals, as we have noted, treated the bare allegation of the knowing use of false testimony as having incorporated the explanatory statement in petitioner's appellate brief. Whether such an expanded allegation states a sufficiently specific violation of due process within the meaning of *Mooney* v. *Holohan*, 294 U. S. 103, is a question which we need not now answer. Nor is it necessary here to decide the propriety of treating a statement in an appellate brief as an amplification of an allegation in the trial court, a practice to which the Government makes objection.

But in dealing with the alleged abuse of the writ of *habeas corpus*, we find it undenied that the explanatory statement illuminates the allegation made in the District Court. The statement makes clear the incident to which petitioner had reference when he alleged the knowing use of false testimony. In other words, the essence of petitioner's charge is that the prosecution brought undue pressure to bear on the Government's chief witness, Donner, to change his testimony and that this altered testimony was knowingly used to obtain petitioner's conviction. Cf. *Pyle* v. *Kansas*, 317 U. S. 213, 215–216. The issue now is whether petitioner has so abused the writ of *habeas corpus* as to bar a consideration of this allega-

tion, whether it be general or specific in form or whether it be supported or unsupported by factual references.

From the facts which we have previously detailed it is evident that this allegation was not properly raised prior to the amendment of the fourth petition. None of the three prior petitions had made this point. In the first proceeding, it is true, petitioner's traverse to the warden's return called the court's attention to the differing statements allegedly made by Donner and claimed that certain undefined "methods" had been used to obtain the change in testimony. Petitioner was apparently trying to raise the due process issue formulated in *Mooney* v. *Holohan, supra.* But his effort was without success. A mere claim that a witness gave inconsistent testimony is not enough to charge the prosecution's knowing use of false testimony; it may well be that the witness' subsequent statements were true, in which event the claim of inconsistency is not a constitutional objection. Since this due process issue was not properly raised, we cannot assume that the District Court's action in dismissing the first petition on the pleadings was a determination against petitioner on the merits of the issue.

Further elaboration of the Donner incident was made by petitioner in the course of seeking review of the District Court's action on the first petition. Both in the Circuit Court of Appeals and in this Court he claimed that he had been denied a fair and impartial trial by Donner's alleged shift in testimony; and in this Court he stated that there had been a conspiracy to force Donner to change his story. It is noteworthy that the Government did not see fit to deny or controvert petitioner's claim until the case reached this Court. We need not decide whether the due process issue was properly raised in the review proceedings, inasmuch as petitioner's failure to make a proper allegation in that respect in the District

Court foreclosed any determination of the matter. And as we have noted, the second and third petitions for *habeas corpus* were completely silent as to this due process issue.

There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger* v. *Loisel,* 265 U. S. 224, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while *habeas corpus* proceedings are free from the *res judicata* principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later *habeas corpus* application raising the same issues is considered. But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Waley* v. *Johnston,* 316 U. S. 101.

Likewise irrelevant to the instant proceeding is *Wong Doo* v. *United States,* 265 U. S. 239. In that case, the petitioner set forth two grounds for discharge in his first petition. At the hearing, he offered no proof in support of the second ground. The petition was dismissed on the theory that the first ground was not good in law. A subsequent *habeas corpus* petition relied entirely on the second ground alleged in the first petition. This Court held that the petitioner had had full opportunity to offer proof as to the second point at the hearing on the first petition, proof which was accessible at all times. If he was intending to rely on that ground, good faith required that he produce his proof at the first hearing. "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive

use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered." 265 U. S. at 241.

The *Wong Doo* case thus involved a situation where one has properly raised an issue in an earlier petition, has received a full opportunity at a hearing to present evidence on the point, and has refused to avail oneself of that opportunity. The distinguishing features in the instant case are obvious.

There is one factor in this case that might be thought to justify the dismissal of the fourth petition as an abusive use of the *habeas corpus* writ. That factor is that petitioner had prior knowledge of the Donner incident which forms the basis, at least in part, of the due process allegation now being made. The record in the first proceeding shows that petitioner's own lawyer elicited the information from Donner that he had talked with the prosecuting lawyers during the interlude between the allegedly conflicting statements. And petitioner made reference to that information during the course of the first *habeas corpus* proceeding in the manner heretofore described. Petitioner now utilizes that same information in alleging that the prosecution made a knowing use of false testimony.

In the first place, however, we cannot assume that petitioner has acquired no new or additional information since the time of the trial or the first *habeas corpus* proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. As Judge Denman stated in his dissenting opinion below, 161 F. 2d at 708–709: "The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting

witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney could only have been learned after conviction and after the convicted man was in the penitentiary."

Whether petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. Cf. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249.

In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Moreover, we do not believe that the burden was on the petitioner of affirmatively alleging in the first instance that he had acquired new information or that he had adequate reasons for not raising sooner the issue

of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in *habeas corpus* proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. Cf. *Holiday* v. *Johnston,* 313 U. S. 342, 350; *Pyle* v. *Kansas, supra,* 216; *Tomkins* v. *Missouri,* 323 U. S. 485, 487; *Rice* v. *Olson,* 324 U. S. 786, 791–792.

And so if the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of *habeas corpus,* it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without an expressed reason. And the prisoner is given a fairer oppor-

tunity to meet all possible objections to the filing of his petition.

It is obvious that the procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the *habeas corpus* writ. The Government's response to the order to show cause was too indefinite and vague to give petitioner a fair opportunity to meet this important issue. Merely quoting the court's opinion in the third *habeas corpus* proceeding was not enough to require petitioner to explain his reasons for failing to present earlier his allegation as to the knowing use of false testimony. And the court either failed or was unable to delineate the issue by making specific findings and conclusions of law or by explaining its view of the matter in a written opinion.

We are not unaware of the many problems caused by the numerous and successive *habeas corpus* petitions filed by prisoners.[13] But the answer is not to be found in repeated denials of petitions without leave to amend or without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make *habeas corpus* proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons.

To that end, we reverse the judgment below and remand the instant case to the District Court for further proceedings consistent with this opinion. We do not hold that the District Court, on remand, must grant the fourth *habeas corpus* petition if it is unsupported and unsub-

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[13] See discussions in *Dorsey* v. *Gill,* 80 U. S. App. D. C. 9, 148 F. 2d 857; Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F. R. D. 313; Note, 61 Harv. L. Rev. 657.

stantiated; nor do we hold that a hearing must now be held on the merits of the allegation in question. Rather the case must be developed further in light of the principles discussed herein. The Government is free to amend its return to bring into focus whatever abuse of the writ of *habeas corpus* it thinks petitioner has committed. And the petitioner is free to answer such charge as may be made in that respect, the burden being on him to show that he is entitled at this late date to make the allegation as to the knowing use of false testimony. The District Court may then dispose of the matter on the pleadings or order that a hearing be had to develop the facts. If the court eventually determines that petitioner has not abused the writ, the allegation of the knowing use of false testimony should be decided as to its sufficiency and its merits. But in any event the court should make explicit its determination of the preliminary problem of the abusive use of the writ.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, dissenting.

I agree with the views of MR. JUSTICE JACKSON that, in the light of all the long-drawn-out prior proceedings, the two lower courts justifiably found the fourth petition for *habeas corpus* in this case without merit on its face. It is not too much to ask the petitioner to state, however informally, that his fourth petition is based on newly discovered matter, or, in any event, on a claim that he could not fairly have been asked to bring to the court's attention in his three prior petitions. Such a requirement certainly does not narrow the broad protection which the writ of *habeas corpus* serves. I also agree with his general attitude against a prisoner being brought from Alcatraz—or any other federal prison—to argue his own case

on appeal. My difference with him is that I would not bolt the door to such an undesirable practice, as a matter of law, but merely leave it as a rigorous rule of practice. The power to depart from this rule ought not to be wholly foreclosed, even though opportunity for its exercise is left for contingencies not easily foreseeable.

The office of the writ of *habeas corpus* precludes definitive formulation of its limitations precisely because it is the prerogative writ available for vindicating liberties. See *Sunal* v. *Large,* 332 U. S. 174, 184, 187. Therefore, I would not preclude the use of the writ to bring a convict before a circuit court of appeals where circumstances in the interests of justice make his presence compelling. See *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 272–75. It is a very different thing to judge the use of the writ for the purpose of having an incarcerated petitioner argue his own case on appeal by the ordinary standards of judicial discretion. To acknowledge such power in the circuit courts of appeals implies too broad an authority, in that the abuse of its exercise in granting the writ is too narrow a basis for review. A general rule should preclude the use of the writ for the purpose of taking a prisoner out of confinement merely to argue his own case on appeal from dismissal of a petition for *habeas corpus* after conviction. Every legitimate right of such a prisoner can be safeguarded by means much more consonant with the fair and seemly and wise administration of justice.

THE CHIEF JUSTICE and MR. JUSTICE REED join in this dissent.

MR. JUSTICE JACKSON, dissenting.

I cannot agree that the District Court erred in dismissing this unsupported and unsubstantiated fourth *habeas corpus* petition, whether his action in so doing was

based on its obvious lack of merit or on the prisoner's abuse of the writ. Nor can I agree that appearance of a prisoner merely to argue his case is "necessary for the exercise" of the jurisdiction of the Court of Appeals and "agreeable to the usages and principles of law" as is required by § 262 of the Judicial Code, 28 U. S. C. § 377.

This case is typical of many based on repeated *habeas corpus* petitions by the same prisoner.[1] This petitioner is serving a long term for armed bank robbery. Confinement is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one *habeas corpus* application after another. If the trial court rules one set of allegations deficient, concoction of another set may bring success. Under this decision, failure to allege the most obvious grounds in earlier applications, or to support them with facts in

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[1] Petitioner was convicted of armed bank robbery in April, 1938. After that date, and prior to the filing of this current *habeas corpus* petition, he took the following steps seeking his liberty:

1. In 1940, petitioned the Court of Appeals for mandamus to force the trial judge to act on an application for appeal; that court found no such application was then pending and denied the petition; this Court denied certiorari, 311 U. S. 703, and a rehearing, 311 U. S. 729.

2. In 1940, filed an application for *habeas corpus*. After argument by court-appointed counsel, the application was dismissed. The Court of Appeals affirmed, 125 F. 2d 806; this Court denied certiorari, 316 U. S. 677, and denied rehearing, 316 U. S. 712, the latter decision being announced June 1, 1942.

3. On September 24, 1942, filed another *habeas corpus* petition. After hearing, participated in by court-appointed counsel, the petition was dismissed. The Court of Appeals affirmed, 144 F. 2d 260; this Court denied certiorari, 323 U. S. 789, and denied rehearing, 323 U. S. 819, the latter decision being announced on January 29, 1945.

4. Prior to August 22, 1945, filed third *habeas corpus* petition, which was denied on that date, 61 F. Supp. 995.

The current petition was filed in January, 1946.

a later petition, is not fatal. The number of times the Government must re-try the case depends only on the prisoner's ingenuity, industry and imagination. This prisoner, in his fourth petition in eight years, has now gotten around to charging that, at his trial in 1938, the Government knowingly employed false testimony to obtain the conviction. This issue substantially involves a retrial of the original conviction after more than ten years have passed by, memories are blurred, evidence is lost, and parties dispersed. The petition is unaccompanied by any particulars supporting this most serious charge against the court and responsible officers of the law. The prisoner, of course, has nothing to lose in any event. Perjury has few terrors for a man already sentenced to 65 years' imprisonment for a crime of violence. Even such honor as exists among thieves is not too precious to be sacrificed for a chance at liberty. Consequently, his varying allegations can run the gamut of all those perpetuated in the pages of the United States Reports.

The Court now holds that such irresponsible, general, unsupported and belated accusations must be tried out; further, the District Judge erred in that he did not request the perennial petitioner to fill in details, the absence of which, under established rules, justified his dismissal of the petition actually filed. I think that the Government should not be required to go to trial (or rather, retrial) on a case of this kind, unless the petitioner, without prompting or solicitation by the court, alleges with particularity conduct which would be sufficient, if proved, to entitle him to release. If he does not have such facts, he is doomed ultimately to fail; if he does have them, he should not be permitted to force the court and the Government into further litigation until he has disclosed them. And certainly it is not too much to require that on a fourth petition, eight years after conviction, the petitioner must also set forth facts which will excuse

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his failure to raise his question in earlier petitions instead of at a period so remote from his trial.

Moreover, if any one of petitioner's applications and accompanying facts convince the trial judge that a hearing on the merits is justified, the prisoner's presence in the trial court, to testify, may fairly be said to be necessary. The procedure for bringing him before that court to give his evidence is of ancient origin. But it is another and quite different matter to say that a layman's presence, solely to take part in a legal argument on a settled record, is necessary for the exercise of the jurisdiction of the appellate court. The only suggested authority for so ordering a jailer to fetch a prisoner to argue his own appeal is § 262 of the Judicial Code, 28 U. S. C. § 377, which provides that "the Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute," and if the statute stopped here, the Court might have some basis for its action. But the section adds, "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Even if the Court of Appeals, or this Court, believed that the former should have the power to summon prisoners for argument of their appeals, that is not the issue. The issue is, can the requirements of the statute be met? Is the prisoner's presence merely to argue his case "necessary for the exercise" of the appellate court's jurisdiction? I think it is far-fetched to so hold.[2] Such courts

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[2] It is a very different thing to find the presence of the prisoner "necessary" under such circumstances as in *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 274, where this Court explained the necessity as follows:

"The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a

may, and usually do, appoint counsel for a prisoner who cannot obtain one for himself. If there is more that the defendant himself wants to present, it can always be done in writing. Many cases are decided in appellate courts solely on written briefs. But the Court fears that some prisoners like this one may not only refuse counsel but also wish not to rest on a written brief. Under the statute, however, it is not the convenience or the egotism of the prisoner that confers power to grant a writ—it is the *necessity* of the writ for the exercise of the Court's jurisdiction. It is difficult for me to believe that prisoners, whom the Court so often forgives for violating all rules of pleading and procedure on the ground of lay ignorance, can be a necessary source of light and leading to an appellate court. The absence of such a necessity is, I suppose, the reason why no such writ has been known to the law until today's revelation, and why the statute does not allow it. But the Court by this decision makes it proper for any prisoner, whose appeal from either conviction or denial of any one of his multitudinous petitions for *habeas corpus* is before the Court of Appeals, to insist that he be transported to that court to argue the case and to demand a ruling by the court on that issue as well as on the merits. This seems to open the gate to new and fruitless litigation.

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bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted 'whether any [bill] can ever be made up on which the appeal can be heard . . . In the particular circumstances of the case at bar, it seems to us that the writ is "necessary to the complete exercise" of our appellate jurisdiction because . . . there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered.' "

Admittedly, the statute's second requirement, *viz:* that the writ be "agreeable to the usages and principles of law," cannot be met. It is apparent that the latter clause is a limitation on the earlier sweeping grant of power. *Ex parte Bollman and Swartwout,* 4 Cranch 75, 99. The Circuit Courts of Appeals are statutory courts and must look to a statutory basis for any jurisdiction they exercise. But in this case the Court is authorizing a complete overriding of the limitation Congress has seen fit to impose. The Court's opinion points out that employment of the writ of *habeas corpus* for this purpose has never been a usage or principle of the common law. No statutory or decisional [3] basis for such a usage or

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[3] The Court says that it "translates" the "assumption," found in one decision of this Court, one of a Court of Appeals, and one of a state court, into a specific holding that the Circuit Courts of Appeals do have this power. The *dictum* in *Schwab* v. *Berggren,* 143 U. S. 442, 449 is merely this: ". . . But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused; especially, where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case." In *Goldsmith* v. *Sanford,* 132 F. 2d 126, cert. den. 318 U. S. 762, rehearing denied 318 U. S. 799, the Court said: ". . . We know of no precedent for taking a prisoner from the penitentiary that he might be present to argue in person his appeal from an adverse judgment on habeas corpus. . . . If there be power to order the removal which was requested, discretion was well exercised in refusing it." In *Donnelly* v. *State,* 26 N. J. Law 463, affirmed, 26 N. J. Law 601, which could hardly be even persuasive here, the Court held that the prisoner's presence was not necessary for jurisdiction, nor was it required as a technical necessity or a matter of right.

The "translation" of these "assumptions" into a holding involves, under this statute, a decision that these three isolated statements

principle is cited. Yet, ignoring the limitations of this very statute, the Court concludes that the writ can just be issued anyway. I cannot subscribe to this sort of statutory "construction."

This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoners make the best of increased opportunities to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation.[4]

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represent the "usages and principles of law." Those terms have been in the statute since the original Judiciary Act of 1789, and the Court admits there was no such usage or principle prior to that time. These three later cases are therefore the only shadow of a basis for holding that a writ such as the Court now directs meets the requirements of the statute. To consider such unauthoritative sources as a precedent on this point would be bad enough—but to enlarge them to a usage or principle of law is even less warranted. Reliance on these isolated pronouncements, which, either individually or collectively, are far from being authority on this point, seems close to creating precedents out of thin air.

[4] Such depreciation has already set in. See Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F. R. D. 313, stating, at page 315, that from June 1937 to June 1947 6 prisoners in Alcatraz filed a total of 68 petitions, while 57 others filed 183 petitions. See also *Dorsey* v. *Gill*, 80 U. S. App. D. C. 9, 148 F. 2d 857, stating (862–863) that in one five-year period one prisoner filed 50 petitions in the District Court for the District of Columbia; four others filed 27, 24, 22 and 20, respectively; and 119 prisoners filed 597 petitions, an average of 5 each.

HUNTER, WARDEN, *v.* MARTIN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 643. Argued April 22, 1948.—Decided May 24, 1948.

A state prisoner sentenced by a federal court to imprisonment for ten years beginning "at the expiration of the sentence now being served" in the state prison, who is paroled from the state prison before expiration of the state sentence and surrendered by state authorities to federal custody, must begin serving his federal sentence immediately and is not entitled to temporary freedom pending expiration of the full term of the state sentence. Pp. 302–304.

165 F. 2d 215, reversed.

In a habeas corpus proceeding, a district court discharged the writ and remanded a federal prisoner to custody. The circuit court of appeals reversed without opinion. 165 F. 2d 215. This Court granted certiorari. 333 U. S. 854. *Reversed*, p. 304.

W. Marvin Smith argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan.*

James F. Reilly argued the cause and filed a brief for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner is held prisoner in the United States Penitentiary at Leavenworth, Kansas. He pleaded guilty to charges of forging and uttering United States Treasury checks. He was sentenced to imprisonment for ten years on each count, to run concurrently, and the judgment provided that sentence should "begin to run at the expiration of the sentence now being served in the Missouri State

Penitentiary." Petitioner was returned to the Missouri authorities to resume the service of a state sentence of three years for automobile theft. On May 13, 1947, before expiration of such period, he was paroled by the State and delivered to the federal authorities, by whom he has since been held. He contends that the federal sentence does not begin until the full term of the State sentence has expired and that, for the period of parole, he is entitled to freedom. The issue as to whether such wording of a federal sentence entitles the prisoner under such circumstances to temporary freedom is one on which Circuit Courts of Appeals are in conflict. Compare *United States ex rel. Lombardo* v. *McDonnell,* 153 F. 2d 919; *Johnston* v. *Wright,* 137 F. 2d 914; *Kirk* v. *Squier,* 150 F. 2d 3; *Martin* v. *Hunter,* 165 F. 2d 215. We brought the case here on certiorari, 333 U. S. 854, to resolve the conflict.

We think it clear that the purpose of the clause deferring commencement of service of the federal sentence was to prevent conflict between the State and Federal Governments. The present federal imprisonment avoids such conflict and achieves that purpose. Missouri authorities have released petitioner from their custody and surrendered him for the apparent purpose of serving his federal sentence and have reserved control over him as a parolee only in event he is not kept in prison during the period of the federal sentence. For all practical purposes contemplated by the judgment, the State sentence has expired—at least insofar as it was an obstacle to service of the federal sentence.

To hold otherwise would mean that a man already finally adjudged guilty of a serious federal crime and sentenced to ten years imprisonment would be left at large and free of all restraint for an interlude between release from the state prison and commencement of the federal term. We do not think such a result is required

or intended under the statute, 18 U. S. C. § 709a,[1] or under the terms of the sentence as imposed.

The District Court, after full hearing, dismissed the writ of *habeas corpus* and remanded petitioner to custody to serve his sentence. We think this was a correct disposition of the matter. The Circuit Court of Appeals' decision to the contrary is error.

Judgment reversed.

BRIGGS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 530. Argued March 30, 1948.—Decided May 24, 1948.

1. In a civil suit in a federal district court, the jury rendered a verdict for plaintiff; but the court dismissed the complaint for lack of jurisdiction. The circuit court of appeals reversed and directed that judgment be entered on the verdict for plaintiff; but its mandate made no provision for interest. *Held:* In entering judgment under the mandate, the district court may not add interest from the date of the verdict to the date of judgment. Pp. 305–307.
2. The rule that an inferior court has no power or authority to deviate from a mandate issued by an appellate court interdicts allowance of interest not provided for in the mandate. P. 306.

164 F. 2d 21, affirmed.

In a suit under the Federal Employers' Liability Act, the jury returned a verdict for the plaintiff but the district court dismissed the complaint for lack of jurisdiction. The circuit court of appeals reversed, 153 F. 2d 841, and directed that judgment be entered on the verdict. The district court entered judgment for the amount of the verdict plus interest from the date thereof to the date

[1] The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381.

of judgment. The circuit court of appeals modified the judgment to exclude the interest. 164 F. 2d 21. This Court granted certiorari. 333 U. S. 836. *Affirmed*, p. 307.

Sol Gelb submitted on brief for petitioner.

William J. O'Brien, Jr. argued the cause for respondent. With him on the brief were *Louis J. Carruthers, Hugh B. Cox* and *Arthur R. Douglass.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case first presents the question whether a plaintiff recovering under the Federal Employers' Liability Act, 45 U. S. C. § 51, is entitled to have interest on the verdict for the interval between its return and the entry of judgment, where the Circuit Court of Appeals' mandate which authorized the judgment contains no direction to add interest and is never amended to do so.

The jury returned a verdict of $42,500. The District Court then granted a motion, as to which decision had been reserved during the trial, to dismiss the complaint for lack of jurisdiction, and the judgment entered was therefore one of dismissal. However, the Circuit Court of Appeals reversed, 153 F. 2d 841, and directed that judgment be entered on the verdict for plaintiff. When the District Court entered judgment, it added to the verdict interest from the date thereof to the date of judgment. The mandate of the Circuit Court of Appeals had made no provision for interest. No motion to recall and amend the mandate had been made and the term at which it was handed down had expired. Motion to resettle so as to exclude the interest was denied by the District Court. The Circuit Court of Appeals has modified the judgment to exclude the interest in question and to conform to its mandate, 164 F. 2d 21, and the case is here on certiorari, 333 U. S. 836.

In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Himely* v. *Rose,* 5 Cranch 313; *The Santa Maria,* 10 Wheat. 431; *Boyce's Executors* v. *Grundy,* 9 Pet. 275; *Ex parte Sibbald* v. *United States,* 12 Pet. 488. The rule of these cases has been uniformly followed in later days; see, for example, *In re Washington & Georgetown R. Co.,* 140 U. S. 91; *Ex parte Union Steamboat Company,* 178 U. S. 317; *Kansas City Southern R. Co.* v. *Guardian Trust Co.,* 281 U. S. 1. Chief Justice Marshall applied the rule to interdict allowance of interest not provided for in the mandate, *Himely* v. *Rose,* 5 Cranch 313; Mr. Justice Story explained and affirmed the doctrine, *The Santa Maria,* 10 Wheat. 431; *Boyce's Executors* v. *Grundy,* 9 Pet. 275. We do not see how it can be questioned at this time. It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But no move to do this was made during the term at which it went down. While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co.* v. *Hartford Co.,* 322 U. S. 238, it has not been held to survive for the convenience of litigants. *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70.

The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. That it made no provision for interest was apparent on its face. Plaintiff accepted its advantages and brings her case to this Court, not on the proposition that amendment of the

mandate has been improperly refused, but on the ground that the mandate should be disregarded. Such a position cannot be sustained. Hence the question whether interest might, on proper application, have been allowed, is not reached.[1] *In re Washington & Georgetown R. Co.*, 140 U. S. 91.[2]

Affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, dissenting.

We granted certiorari to resolve a conflict between the decision of the Circuit Court of Appeals, 164 F. 2d 21, and one rendered by the like court for the Fifth Circuit in *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847.

In each case the jury returned a verdict for the plaintiff, but the trial court nevertheless gave judgment for the defendant as a matter of law;[1] upon appeal that

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[1] Compare *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847, with *Briggs* v. *Pennsylvania R. Co.*, 164 F. 2d 21.

[2] "We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so; but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term . . . with costs, and without interest . . . ." 140 U. S. 91 at 97.

[1] In this case the complaint was dismissed on the ground that the plaintiff administratrix lacked capacity to bring the action; in the *Pratt* case the trial court found the verdict inconsistent with answers given to special interrogatories, and therefore gave judgment for the defendant.

judgment was reversed; and the cause was remanded with directions to enter judgment on the verdict. In both cases the appellate courts' mandates were silent concerning interest, but the trial courts included in the judgments interest from the date of the verdict, not merely from the time when judgment was entered following receipt of the appellate courts' mandates.[2] In the *Pratt* case this action of the trial court was sustained as conforming to the mandate; in this case the trial court's like action was reversed as being in excess of and, to that extent, contrary to the mandate.

The two cases thus present squarely conflicting decisions on two questions: (1) whether the appellate court's mandate includes the interest provided by 28 U. S. C. § 811,[3] although the mandate makes no explicit mention of interest; (2) whether, if so, the interest allowed by the section properly runs from the date of the verdict[4]

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[2] In the *Pratt* case the District Court allowed interest not only from the date of the verdict but also from the date of judicial demand. This was modified on appeal to allow interest only from the date of verdict. 142 F. 2d 847.

[3] The section is as follows: "Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State." Rev. Stat. § 966, 28 U. S. C. § 811.

[4] Although § 811 requires calculation of interest "from the date of the judgment," the claim is that, in circumstances like these, the words "the judgment" should be taken to specify not the time of entering judgment after appeal and issuance of mandate following reversal, but the time when judgment properly would have been entered but for the delay caused by the defendant's resistance to the plaintiff's rightful claim as established on appeal. Cf. Fed. Rules Civ. Proc., Rule 58. Petitioner fixes this time as the date of the

or only from the time of entering judgment after receipt of the appellate court's mandate. Both questions are necessarily involved on petitioner's presentation and should now be decided.

This Court, however, declines to answer the second question, because it determines the first in respondent's favor, accepting, erroneously I think, the decision of the Circuit Court of Appeals in this phase of the case.[5] That court construed its mandate as not including interest. This was on the basis that the mandate was silent concerning interest, mentioning expressly only the principal sum awarded by the verdict. In such a case the court said, "the District Court is without power to enter judgment for a different sum."[6] Hence, it was held, the mandate was violated when interest was added to that sum. 164 F. 2d at 23. And even upon the assumption that the mandate might have been amended to include interest by timely application for that purpose, this could not be done after expiration of the term at which the judgment was rendered, as petitioner sought to have done.[7] *Ibid.*

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verdict. It is not necessary now to consider whether, if petitioner's broad contention were accepted, the proper date would be that of the verdict or that on which the trial court concluded its consideration of the case and entered the original judgment for the defendant.

[5] The Circuit Court of Appeals not only rested upon its construction of its mandate and the view that it could not be altered after the term, but also decided the question concerning petitioner's right to interest under § 811 adversely to his claim that it begins to run prior to the date of the trial court's entry of judgment after remand. To what extent this ruling influenced the decision as to the mandate's effect is not clear.

[6] Citing *In re Washington & Georgetown R. Co.*, 140 U. S. 91; *Thornton* v. *Carter*, 109 F. 2d 316. See text *infra* at note 11.

[7] In the *Pratt* case the term of court at which the original mandate of the Circuit Court of Appeals had been handed down had similarly expired.

It is this treatment of the court's mandate, now accepted by this Court and forming the basis for its disposition of the case without reaching the question certiorari was granted to review, from which I dissent. It confuses settled lines of distinction between different statutes and of decisions relating to them. I think these were correctly drawn and ought to be maintained. If that were done, we would be forced to reach and decide the question now avoided concerning the effect of § 811.

Ordinarily it is for the court issuing a mandate to determine its scope and effect, and other courts are bound by its determination. But this is not always so. If it were true, for example, that the silence of a mandate or a judgment regarding interest invariably precluded its recovery, the Court's decision and that of the Circuit Court of Appeals would be correct. But an explicit provision for interest is not always necessary to its inclusion, whether in a judgment or a mandate. In some instances interest attaches as a matter of law, even though the mandate or judgment is wholly silent regarding it. In others explicit mention is necessary to its inclusion. *Blair* v. *Durham,* 139 F. 2d 260, and authorities cited.

Where the claim for interest rests upon statute, whether the one or the other effect results depends upon the terms and effect of the particular statute on which the claim is founded. Because not all statutes are alike in this respect, the terms and intent of each must be examined, when put in question, to ascertain whether the interest allowed attaches to the judgment or the mandate by operation of law or only upon explicit judicial direction. Usually this is resolved by determining whether the interest allowed is to be given in the court's discretion or as a matter of right. *Blair* v. *Durham, supra.*

As the *Blair* opinion points out, ordinarily there is no occasion to mention statutory interest expressly, since it

attaches as a legal incident from the statute allowing it.[8] On the other hand, it has often been declared that interest is not allowed on judgments affirmed by this Court or the Circuit Courts of Appeals unless so ordered expressly.[9] The *Blair* opinion, however, further notes that all the cases so declaring are founded upon another statute than the one involved here, namely, 28 U. S. C. § 878.[10] And, it may be added, the decisions relied upon by this Court and by the Circuit Court of Appeals in this phase of the case presently before us involved either § 878 or the allowance of other relief not based on § 811.[11]

It becomes important therefore to ascertain whether the two statutes, §§ 811 and 878, are alike in their effects as requiring or not requiring explicit mention of the interest provided for in order for it to be included in a

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[8] *Massachusetts Benefit Assn. v. Miles,* 137 U. S. 689.

[9] See the cases cited in note 10.

[10] 139 F. 2d 260, 261. The authorities cited were *In re Washington & Georgetown R. Co.,* 140 U. S. 91; *Boyce's Executors* v. *Grundy,* 9 Pet. 275; *De Witt* v. *United States,* 298 F. 182; *Green* v. *Chicago, S. & C. R. Co.,* 49 F. 907; *Hagerman* v. *Moran,* 75 F. 97.

[11] None of the cases on which this Court bases its decision involves § 811. They involve either § 878 (*Boyce's Executors* v. *Grundy,* 9 Pet. 275; *In re Washington & Georgetown R. Co.,* 140 U. S. 91, which the majority emphasize by quotation); the allowance of interest in the absence of statute as, *e. g.,* where goods are illegally seized and detained (*Himely* v. *Rose,* 5 Cranch 313; *The Santa Maria,* 10 Wheat. 431); or the granting of relief, other than interest, beyond that decreed in the mandate (*Ex parte Sibbald* v. *United States,* 12 Pet. 488; *Ex parte The Union Steamboat Company,* 178 U. S. 317; *Kansas City So. R. Co.* v. *Guardian Trust Co.,* 281 U. S. 1).

Of the cases cited by the Circuit Court of Appeals, see note 6, *In re Washington & Georgetown R. Co., supra,* is a § 878 case, and *Thornton* v. *Carter,* 109 F. 2d 316, does not turn on § 811.

Thus, none of the authorities relied on governs the question presented here, *viz.,* whether under § 811 the mandate of the reviewing court excluded interest and was violated by its addition.

judgment or mandate. The two sections are very different in their terms. Section 878 authorizes the federal appellate courts to award damages for delay,[12] and in terms makes the award discretionary with the reviewing court. *Schell* v. *Cochran,* 107 U. S. 625. It is in connection with such awards, as has been stated, that the repeated decisions now applied to petitioner's claim, grounded solely on § 811, have held that interest is to be deemed denied unless explicitly mentioned in the mandate.[13]

On the other hand, § 811 is very different. Nothing in its terms permits an implication that the award of interest is to be made as a matter of judicial discretion. The language is mandatory.[14] The section's obviously discriminating use of words, emphasized by comparison with that of § 878, gives the interest it encompasses as a matter of right. *United States* v. *Verdier,* 164 U. S. 213. This is so whether that interest begins to run as of one date or another. Whatever interest the section allows attaches as an incident flowing from the statute and is dependent in no way upon judicial discretion or upon judicial inadvertence in failing to mention it. This was the effect of the decisions in the *Pratt* and *Blair* cases, as well as *United States* v. *Verdier, supra.*

The Court's decision ignores these vital differences in the statutes, their terms and effects. Consequently it misapplies the decisions relating to § 878 and other situ-

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[12] The section is as follows: "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion." Rev. Stat. § 1010, 28 U. S. C. § 878.

[13] See the authorities cited in note 10; see also note 11.

[14] "Interest *shall* be allowed on all judgments in civil causes, recovered in a district court, and *may* be levied . . ."; "it *shall* be calculated . . . ." (Emphasis added.) See note 3.

ations where the relief sought was discretionary, to this claim arising only under § 811. The same thing happened in the Circuit Court of Appeals. However, the two sections differ so greatly in their terms, as bearing on whether the mandate's failure to mention interest excluded it, that there can be no justification for confusing or identifying them in this respect. The decisions construing § 878 are neither controlling nor pertinent to that problem when it arises under § 811.

Petitioner's only claim is under the latter section. He seeks as of right interest given by § 811 and attaching to the judgment entered in his favor regardless of the mandate's omission to mention interest. This claim in my opinion is well grounded, to whatever extent § 811 allows interest. To that extent interest attaches and was meant to attach by operation of law, and regardless of the mandate's specificity, to the judgment rendered for the plaintiff. The extent to which the section gives interest is, of course, a distinct question, depending in this case on whether the section contemplates that the interest shall begin to run at one date or another.

Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; [15] and the uncertainty

[15] Cf. note 4. The matter is somewhat complicated by the anomaly which would result from a decision that, while § 878 provides for allowance of interest as damages for delay when a decision is affirmed, neither that section nor § 811 explicitly provides any such indemnity when a judgment for the defendant is reversed with directions to enter judgment for the plaintiff; and by the considerations, obviously relevant on the face of § 811, see note 3, relative to securing uniformity in the allowance of interest as between the federal courts and courts of the state in which the federal court sits. Cf. *Massachusetts Benefit Assn.* v. *Miles,* 137 U. S. 689; cf. also *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

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as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants.

PATERNO *v.* LYONS, COMMISSIONER OF CORRECTION.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 583. Argued April 28, 1948.—Decided June 1, 1948.

Indicted in a New York state court for receiving stolen property, petitioner was permitted to plead guilty to attempted grand larceny second degree, a lesser offense not charged in the indictment. He failed to avail himself, within the time prescribed, of state law remedies for challenging the validity of the conviction under state law. Later he was convicted for another offense and sentenced as a second offender. Thereafter he attacked the validity of the first conviction under state and federal law. Upon review here of a judgment denying relief, *held:*

1. The decision of the highest court of the State that acceptance of the plea of guilty to the lesser offense did not deprive petitioner of his right under the state constitution to be prosecuted for an infamous crime only upon a grand jury indictment was binding here. Pp. 318–319.

2. The remedies provided by state law for challenging the validity of the conviction under state law (viz., motion to withdraw plea of guilty, motion in arrest of judgment, or direct appeal) were adequate from the standpoint of the due process of law guaranteed by the Fourteenth Amendment, at least in the absence of any showing that petitioner was without opportunity effectively to take advantage of such remedies. P. 319.

3. In view of the relationship of the two offenses under the state statutes, the indictment charging only receiving stolen property afforded petitioner reasonable notice and information of the lesser offense to which he pleaded guilty; and he was not in this respect denied due process of law. Pp. 319–322.

297 N. Y. 617, 75 N. E. 2d 630, affirmed.

A county court of New York adjudged invalid a conviction of petitioner upon a plea of guilty in a criminal prosecution, 187 Misc. 56, 60 N. Y. S. 2d 813, but was prevented from vacating the judgment by a writ of prohibition issued upon the application of the State. 272 App. Div. 120, 69 N. Y. S. 715. The Court of Appeals affirmed. 297 N. Y. 617, 75 N. E. 2d 630. This Court granted certiorari. 333 U. S. 831. *Affirmed,* p. 322.

William H. Collins argued the cause and filed a brief for petitioner.

Irving I. Waxman, Assistant Attorney General of New York, argued the cause for respondent. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

Mr. Justice Black delivered the opinion of the Court.

October 30, 1936, the petitioner was indicted in the County Court of Erie County, New York, on a charge of

> "Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously brought [*sic*], received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop."

The punishments provided for this offense and for larceny are substantially the same. Both may, according to circumstances, range up to ten years at hard labor.[1] November 10, 1936, petitioner appeared in court with counsel,

[1] N. Y. Penal Law §§ 1294, 1297, 1308.

pleaded not guilty to the indictment, and was released on a bond of $2500. Five months later, on April 14, 1937, he again appeared in Erie County Court and upon agreement with the district attorney was "permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree." Under New York law the punishment for such an attempt can be no more than half the punishment provided for the offense attempted.[2] The sentence, not imposed until July 16, three months after the plea of guilty, was for fifteen months minimum and thirty months maximum at hard labor. This sentence was suspended and petitioner was placed on probation with a requirement that he "make restitution $75.00 cash balance as determined by probation dept."

Although discharged from probation December 1, 1938, petitioner on December 27, 1945, made a motion in the nature of *coram nobis* in the Erie County Court asking that court to vacate and set aside its former conviction of petitioner, permit withdrawal of the plea of guilty, and for leave to plead *de novo*. There was a special reason why petitioner wished to vacate this judgment long after the probationary restraints of the sentence had been lifted. In the meantime he had pleaded guilty in the Chautauqua County Court, New York, to the crime of robbery second degree under an indictment charging him with robbery first degree. In accordance with the requirements of the

[2] N. Y. Penal Law § 261. Maximum punishment for grand larceny second degree is 5 years. N. Y. Penal Law § 1297. The District Attorney explained his reasons for the agreement in these words: "Only a very small portion of the stolen property was recovered and that was found in the possession of several admitted inmates of a disorderly house who are of necessity the chief witnesses for the People in this case. For these reasons and because of the character of these witnesses, it is recommended that the defendant be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree."

New York second felony offender law [3] the Chautauqua County judge had sentenced petitioner to 15 to 30 years at hard labor, proof having been made before him of petitioner's prior Erie County conviction for attempted grand larceny second degree.

The grounds of the motion in the nature of *coram nobis* were that the Erie County Court had exceeded its power in accepting his plea of guilty to the offense of attempted grand larceny second degree under the indictment which charged him with the offense of receiving, concealing, and withholding property knowing it to have been stolen. He alleged that judgment of conviction in a case initiated by an indictment which did not include the charge to which he had pleaded guilty denied him his right under Art. 1, § 6 of the New York Constitution to be prosecuted for an infamous crime only on indictment of a grand jury,[4] and also denied him due process of law guaranteed by the Fourteenth Amendment.[5]

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[3] N. Y. Penal Law § 1941.

[4] "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . . ." N. Y. Const., Art. 1, § 6.

[5] These questions had previously been raised by petitioner in other New York courts without success. In 1943 he had moved the Chautauqua County Court to vacate its judgment, under which he had been sentenced as a second felony offender. That Court held it was without power to pass upon the validity of the Erie County judgment and dismissed his motion. *People* v. *Paterno,* 182 Misc. 491, 50 N. Y. S. 2d 713. In another proceeding the Appellate Division of the New York Supreme Court, relying on *People ex rel. Wachowicz* v. *Martin,* 293 N. Y. 361, 57 N. E. 2d 53, held that habeas corpus was not available to obtain vacation of the judgment, and that the only way to raise a question as to whether a plea of guilty to attempted larceny could be accepted under an indictment such as that against Paterno was by appeal or motion in arrest of judgment. *People ex rel. Paterno* v. *Martin,* 268 App. Div. 956, 51 N. Y. S. 2d 679.

The judge of the Erie County Court was of opinion that acceptance of the plea of guilty to the lesser offense deprived him of rights guaranteed by the New York Constitution and that therefore his conviction was without due process of law. 187 Misc. 56, 60 N. Y. S. 2d 813. That judge was prevented from vacating the judgment, however, by a writ of prohibition issued upon the application of the State by the Supreme Court of Erie County. That court held that Paterno had "been denied no constitutional or legal right." The Fourth Department of the Supreme Court, Appellate Division, affirmed, 272 App. Div. 120, 69 N. Y. S. 2d 715, stating that acceptance of Paterno's plea to the lesser offense might have been an error of law which would have justified relief by motion in arrest of judgment or by appeal as of right; but that petitioner, having declined to avail himself of these remedies within the statutory period, could not later raise the question.[6] It failed to accept Paterno's claim that the circumstances under which his plea was entered deprived him of due process of law. The New York Court of Appeals affirmed without opinion. 297 N. Y. 617, 75 N. E. 2d 630. We granted certiorari. 333 U. S. 831.

It is again contended here that acceptance of petitioner's plea of guilty to attempted grand larceny second degree under an indictment which charged that he had bought, received, concealed, and withheld stolen property deprived him of his right under the New York Constitution to be prosecuted for an infamous crime only on a grand jury indictment and that consequently the Erie County judgment of conviction is a nullity. But this con-

[6] The State argues here that while petitioner had a right to appeal and challenge acceptance of the plea of guilty under the circumstances shown, neither *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, nor any other New York Court of Appeals case has squarely held that the trial court's action would have constituted reversible error.

tention as to New York law has previously been rejected by the State's highest court, in *People ex rel. Wachowicz* v. *Martin,* 293 N. Y. 361, 57 N. E. 2d 53, and was again rejected by the New York courts in this case. Their decision on such a state question is final here. *In re Duncan,* 139 U. S. 449, 462; *West* v. *Louisiana,* 194 U. S. 258, 261.

Petitioner next argues that the State has failed to supply him an available remedy to attack the judgment against him and that such a failure denies him due process of law guaranteed by the Fourteenth Amendment. See *Mooney* v. *Holohan,* 294 U. S. 103, 113. But this contention falls with its premise. Petitioner, within the periods prescribed by New York statutes, could have challenged any alleged errors of state law either by filing a motion to withdraw his plea of guilty, or a motion in arrest of judgment, or by taking a direct appeal from the original judgment.[7] Certainly in the absence of any showing that petitioner was without an opportunity effectively to take advantage of these corrective remedies to challenge purely state questions such remedies are adequate from a due process standpoint. See *Parker* v. *Illinois,* 333 U. S. 571; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 169, and cases cited n. 6.

Petitioner further challenges the judgment as a denial of due process upon the ground that the indictment charged him with one offense and that the judgment was based on a plea of guilty to an entirely separate offense.

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[7] N. Y. Code Crim. Proc. §§ 337, 467, 469, 517, 519–521; N. Y. Laws 1946, c. 942; N. Y. Laws 1947, c. 706; *Matter of Hogan* v. *Court of General Sessions,* 296 N. Y. 1, 68 N. E. 2d 849; *Matter of Hogan* v. *N. Y. Supreme Court,* 295 N. Y. 92, 65 N. E. 2d 181; *People ex rel. Wachowicz* v. *Martin,* 293 N. Y. 361, 57 N. E. 2d 53; *People* v. *Gersewitz,* 294 N. Y. 163, 61 N. E. 2d 427; *Matter of Morhous* v. *N. Y. Supreme Court,* 293 N. Y. 131, 56 N. E. 2d 79; *Matter of Lyons* v. *Goldstein,* 290 N. Y. 19, 47 N. E. 2d 425; see *Canizio* v. *New York,* 327 U. S. 82, 84–85.

This challenge again basically rests on the allegation that under New York law an indictment for receiving stolen property does not necessarily include a charge of an attempt to steal the property. Petitioner's motion to vacate on such a federal constitutional ground appears to be an available procedure under New York law,[8] and the courts below so assumed. Determination of this federal due process question does not depend upon whether as a matter of New York law the Erie County judge erred in permitting petitioner to plead guilty.[9] The question turns rather upon whether the petitioner under the circumstances here disclosed was given reasonable notice and information of the specific charge against him and a fair hearing in open court. *In re Oliver,* 333 U. S. 257, 273, 278; *Cole* v. *Arkansas,* 333 U. S. 196, 201. We agree with the New York courts that this petitioner had such notice and information. The fairness of the hearing afforded petitioner is not challenged.

There is close kinship between the offense of larceny and that of receiving stolen property knowing that it was stolen. When related to the same stolen goods, as here, the two crimes certainly may fairly be said to be "connected with the same transaction" as the New York Court of Appeals noted in the *Wachowicz* case. 293 N. Y. at 367, 57 N. E. 2d at 56. A person commits larceny under New York law if he "unlawfully obtains or appropriates" an article, N. Y. Penal Law § 1294; he violates the receiving of stolen property statute if he "in any way . . . conceals, withholds, or aids in concealing or withholding . . . property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute

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[8] See cases cited note 7; Fuld, The Writ of Error Coram Nobis, 117 N. Y. L. J. 2212, 2230, 2248.

[9] See *Caldwell* v. *Texas,* 137 U. S. 692, 698; *In re Converse,* 137 U. S. 624, 631; *Leeper* v. *Texas,* 139 U. S. 462, 468; *Davis* v. *Texas,* 139 U. S. 651; *Howard* v. *Kentucky,* 200 U. S. 164, 173.

larceny," N. Y. Penal Law § 1308. The overlapping nature of the two offenses is further emphasized by the definition of larceny in § 1290, which includes conduct whereby any person who "with the intent to deprive or defraud another of the use and benefit of property, or to appropriate the same to the use of . . . any other person other than the true owner, wrongfully takes, obtains or withholds [any property] by any means whatever, from the possession of the true owner or of any other person . . . ."

It would be exaltation of technical precision to an unwarranted degree to say that the indictment here did not inform petitioner that he was charged with substantial elements of the crime of larceny thereby enabling him, as a means of cutting his sentence in half, to agree to plead guilty to an attempted larceny. Procedural requirements are essential constitutional safeguards in our system of criminal law. These safeguards should constantly and vigilantly be observed to afford those accused of crime every fair opportunity to defend themselves. This petitioner had such opportunity. Months after his first appearance in court he came back and pleaded guilty to an attempt wrongfully to "withhold" the very property of another which the indictment had originally charged him with wrongfully "withholding." [10] It would be a strained interpretation of petitioner's constitutional rights

[10] The Appellate Division's opinion in this case said: "It is true that the crime of attempted grand larceny, second degree is not necessarily included under a charge of criminally receiving stolen property (the then indictment against Paterno) (*People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, *supra*) but one can conceive a set of facts under which one guilty of criminally receiving stolen property could be guilty of larceny in unlawfully withholding the stolen property from the owner thereof. (Penal Law, § 1290; see *People* v. *Vitolo*, 271 App. Div. 959; 136 A. L. R. 1091; and 2 Wharton on Criminal Law, §§ 1122, 1168.)" 272 App. Div. at 126, 69 N. Y. S. 2d at 719.

to hold that under these circumstances he was not given sufficient notice of the charge against him to afford a basis for an intelligent decision to plead guilty to a related but lesser offense than that specifically described in the indictment. The due process clause of the Federal Constitution requires no such holding.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE FRANKFURTER, concurring.

The New York Constitution requires that prosecution for an "infamous crime" be upon indictment by grand jury. The New York Court of Appeals has held that this constitutional requirement does not nullify the acceptance by a trial court of a plea of guilty to the offense of attempted grand larceny, second degree, upon an indictment for knowingly receiving stolen goods. Since, so far as the United States Constitution is concerned, the States may dispense with accusations by grand juries, it is for New York and not for us to decide when the procedural requirements of New York law, not touching those fundamental safeguards which the United States Constitution protects, are satisfied. What is here challenged is New York's determination that the knowing receipt of stolen goods is sufficiently related to larceny so as to permit acceptance of a plea of guilty of the latter on the assumption that an indictment for one affords adequate notice of the other. Surely this does not rise to the dignity of a substantial federal question. In the early days of the Fourteenth Amendment, this Court deemed it appropriate to remind that that Amendment had not made this Court an appellate tribunal to supervise the administration of the criminal law of the States. It is not irrelevant to recall this admonition.

Thus, I agree with the Court's opinion, but draw from it the conclusion that the writ of certiorari should be dismissed for want of a substantial federal question.

HILTON v. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 560. Argued April 21, 1948.—Decided June 1, 1948.

Regulations of the Civil Service Commission applicable to reductions in force of employees of the Federal Government prescribed the following order of priority for retention of "permanent employees": (1) A–1 Plus, World War II veterans for a one-year period after return to duty; (2) A–1, Veteran's preference employees with efficiency ratings of "good" or better; (3) A–2, Employees without veteran's preference with efficiency ratings of "good" or better. Under the regulations, every member of groups A–1 Plus and A–1 was entitled to be retained in preference to those in group A–2, without regard to length of service. Petitioner was classified in group A–2 and was notified of a one-year furlough. He sued for a declaratory judgment, praying that the Commission's A–1 Plus and A–1 classifications be declared void, that he be restored to his position, and that the Commission be required to rescind the regulations and promulgate new ones in accordance with law. *Held:*

1. In the circumstances of this case, petitioner is entitled to challenge the validity of the A–1 Plus as well as the A–1 classification. Pp. 325–328.

2. The A–1 Plus classification is authorized by § 8 of the Selective Training and Service Act of 1940. Pp. 328–333.

(a) The mandatory requirement of § 8 (b) (A) of the Selective Training and Service Act of 1940 that the Government rehire its returning veteran employees is not qualified, as in the case of private employers under § 8 (b) (B), when "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Pp. 328–330, 331.

(b) *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, and *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275, distinguished. Pp. 330–333.

(c) The prohibition of § 8 (c) of the Selective Training and Service Act of 1940 against "discharge" of a reemployed war veteran must be read in light of the different reemployment obligations imposed on private employers and on the Federal Government. P. 331.

(d) Section 12 of the Veterans' Preference Act of 1944 did not so amend § 8 of the Selective Training and Service Act as to confer upon petitioner retention rights based upon his length of service. P. 332.

(e) A one-year furlough, applied to veterans, would be a "discharge" within the meaning of § 8 (c) of the Selective Training and Service Act. P. 333.

3. The A–1 classification, which gives all permanent employee "Veterans with 'good' or higher efficiency ratings" retention preferences over all nonveterans, even over nonveterans with higher efficiency ratings and longer government service, is authorized by § 12 of the Veterans' Preference Act of 1944, in view of that section's legislative history. Pp. 333–339.

(a) The "due effect" required by the first clause of § 12 is given to length of service by its consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. Pp. 335–336.

(b) The question of the wisdom of the policy embodied in a congressional enactment is not for this Court to determine. P. 339.

83 U. S. App. D. C. —, 165 F. 2d 251, affirmed.

In a declaratory judgment action by petitioner against the Secretary of the Navy and the members of the Civil Service Commission to establish his employment status, the District Court granted the Government's motion for summary judgment. The Court of Appeals affirmed. 83 U. S. App. D. C. —, 165 F. 2d 251. This Court granted certiorari. 333 U. S. 841. *Affirmed*, p. 339.

Charles Fahy argued the cause for petitioner. With him on the brief were *Philip Levy* and *Walter B. Wilbur*.

Paul A. Sweeney argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Robert W. Ginnane* and *Melvin Richter.*

John C. Williamson filed a brief for the Veterans of Foreign Wars, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions concerning the relative rights of war veteran and nonveteran employees to retention in government service when a program of reduction in the number of government civilian employees makes it necessary for some to be chosen for discharge. The acute point of controversy is this: In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to nonveterans, even though those nonveterans have served the Government a substantially longer time than the veterans. The questions depend upon whether certain regulations promulgated by the Civil Service Commission are valid under a proper interpretation of controlling statutes.

The petitioner was for twelve years, from 1934 to 1946, a duly appointed permanent status civil service employee working in the Charleston Navy Yard. His work was of such high quality as to earn him an efficiency rating of "Excellent." By successive promotions, he arrived at the responsible position of Leadingman Shipfitter at a basic wage of $12.08 per day. January 7, 1946, shortly after the post-hostility reduction of governmental employees began, petitioner was demoted to a position paying $10.08 per day as part of a reduction in force. This demotion apparently was due in part to the fact that he did not have a veteran's preference. October 7, 1946,

petitioner was notified that due to curtailment of work and funds it was necessary to eliminate certain positions in his competitive level and that in accordance with civil service regulations his name had been reached for action. He was told that, if he approved, he was then to be placed in a one-year "furlough status" rather than absolutely separated from service because it was hoped that conditions might justify his recall to duty within the year. He was also informed that his "active service" had already been terminated and that unless sooner recalled to duty he would be separated for reduction in force at the end of his one-year furlough period.

The civil service regulations said to require termination of petitioner's active service divide government employees into three main groups—A, B, and C. Group A, which has the highest priority for retention, is composed of "permanent employees"; groups B and C are composed of employees with limited tenures of employment. Group A is divided into five subgroups, the first three of which are of particular importance here. These three subgroups are:

> Subgroup A–1 Plus, (Veterans of World War II) for a one-year period after return to duty;
>
> Subgroup A–1, Veterans' preference employees with "good" (or higher) efficiency ratings;
>
> Subgroup A–2, Employees without veterans' preference with "good" (or higher) efficiency ratings.[1]

The result of these Commission groupings is that A–1 Plus veterans have the highest retention priority; A–1 the second; and A–2, in which, not having a veteran's preference, petitioner is classified, has the third. Thus

[1] The remaining two subgroups of A, not involved here, are:

Subgroup A–3, Veterans with efficiency ratings lower than "good."

Subgroup A–4, Nonveterans with efficiency ratings lower than "good." 5 Code Fed. Reg. (Supp. 1945) § 12.303, now found in 5 Code Fed. Reg. (Supp. 1947) § 20.3 (a).

if these regulations are valid, every member of both Subgroup A–1 Plus and Subgroup A–1 must be retained in preference to petitioner.

After receiving notice of his one-year furlough, petitioner filed this complaint in district court for declaratory judgment, mandamus, and other relief. The defendants were the Secretary of the Navy and the members of the Civil Service Commission. The complaint charged that petitioner's demotion and furlough were the result of the Commission's regulations which prescribed retention priorities for veterans' preference employees in A–1 Plus and A–1 over all nonveteran employees without regard to the longer periods of service of some of the nonveteran employees, including petitioner. The failure of the Commission to consider relative length of service in establishing these retention priorities was charged to be "unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions" of applicable statutes. The petitioner's prayer was that the Commission's A–1 Plus and A–1 classifications be declared void, that the Secretary of the Navy be compelled to restore him to his original position as Leadingman Shipfitter, that the Commission be required to rescind the regulations and promulgate new ones in accordance with law, and that "such other and further relief as is just" be granted him. After answer and certain stipulations of fact, both parties moved for summary judgment and the government's motion was granted. The Court of Appeals for the District of Columbia affirmed. 83 U. S. App. D. C. —, 165 F. 2d 251. Importance of the questions raised prompted us to grant certiorari. 333 U. S. 841.

First. While admitting petitioner's right to challenge the validity of Subgroup A–1 in this action, the Government contends that he cannot challenge A–1 Plus. The premise of this argument is that, even if A–1 Plus were invalid, the veterans grouped in it would fall within

Subgroup A–1. We find no adequate support for this premise in the record. Veterans in Subgroup A–1 Plus could not qualify for A–1 unless they had efficiency ratings of "good" or better. But the language defining A–1 Plus includes veterans of all ratings, even below "good." And when the summary judgment in this case was rendered, 61 of the 118 veterans comprising A–1 Plus had not been rated at all. True, the Government asserts that 60 of these veterans have now been rated "good" and the sixty-first member has resigned. But the potential membership of Subgroup A–1 Plus is not limited to those veterans who were in it when the case was tried. The classification provides for a continuing status of preference of one year for all returning veterans who left government employment for war duty. There is no indication that additional war veterans qualified for classification under A–1 Plus will not return to Charleston Navy Yard and reclaim shipfitter jobs in preference to otherwise qualified nonveteran employees. And the Government does not claim that this classification has been repealed or altered so that in the future it can include only those veterans who have an efficiency rating of "good" or higher. Under these circumstances we are unable to say that all members of A–1 Plus could qualify or will be able to qualify as members of A–1. Therefore we cannot accept the government's contention that petitioner's likelihood of injury from A–1 Plus is too remote to justify his attack on it. If invalid, there is as much reason for his right to challenge this subgroup as for his right to challenge Subgroup A–1.

Second. The Government finds support for Subgroup A–1 Plus in § 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U. S. C. § 308. That section provides reemployment rights to any person who under that Act left a position other than a temporary one in order to perform training and service in the armed

forces and who satisfactorily completed his training. It further requires that upon appropriate application after release from training, such person, if still qualified to perform the duties of his old job and "if such position was in the employ of the United States Government, . . . shall be restored to such position or to a position of like seniority, status, and pay." Section 8 (c) also provides that a person so restored to his old position "shall not be discharged from such position without cause within one year after such restoration."

There appears to be little room for contention that there is ambiguity in the language that Congress selected to express its purpose to require the restoration of a former government employee who entered the armed forces to his old position and to give him the right to retention for a year. The language is that such an employee "shall be restored" to his position or to one like it, supplemented by language that he "shall not be discharged from such position without cause within one year after such restoration." We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. The command in § 8 (b) (A) that the Federal Government rehire its returning veteran employees contrasted sharply with the requirement in § 8 (b) (B) that a private employer need not reemploy such a veteran when "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." This difference was noted by the congressional sponsors of the 1940 Act, who thought that the Federal Government should set an example to private industry by providing jobs for all returning veteran employees.[2]

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[2] Hearings before House Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess. 80–82, 118, 235; 86 Cong. Rec. 11697.

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Congress, having thus provided that the veteran who left a government job must be reemployed, also required his retention by declaring that he should not be discharged within a year without cause.

Petitioner contends, however, that this Court's interpretations of § 8 (b) (B) and § 8 (c) in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, and in *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. 275, require a holding that the regulations establishing A–1 Plus are invalid. The *Trailmobile* case dealt only with the obligations of a private employer to veterans after the first year of their return to his employment, and our holding there is of no relevance here. In the other case, Fishgold, following his discharge from the armed forces, had been restored to his old position by his former private employer. Within one year thereafter temporary layoffs became necessary on each of nine days. Fishgold was laid off while nonveterans with longer service were continuously kept at work in accordance with a collective bargaining agreement which required that "decreases" in the working force be based primarily upon "length of service." This Court held that since Fishgold's layoffs were temporary, he still retained an employment relationship, and thus had not been "discharged" within the meaning of § 8 (c). The statute was held not to require that when slack work compelled a private employer to lay off some workers temporarily a veteran restored to his job be given continuous work for one year after his reinstatement in preference to other nonveteran employees who under the terms of company employer-employee contract were entitled to such work by reason of their greater "length of service."

There are several reasons why we cannot accept petitioner's argument that the *Fishgold* case requires the invalidation of the A-1 Plus classification. In the first place, we are here concerned with the one-year retention

rights of veterans restored under § 8 (b) (A) to their old jobs with the Federal Government, not, as in the *Fishgold* case, with the rights of veterans restored to jobs in private industry under § 8 (b) (B). We have previously pointed out that Congress in § 8 (b) (A) imposed a mandatory and unconditional reemployment obligation upon the Federal Government; in other words the section guaranteed that a returning veteran would get back his job with the Government. But § 8 (b) (B) imposed no such unconditional guarantee that a returning veteran would be reemployed by his former private employer. For that subsection does not require restoration of returning veterans to their former private jobs "if the employer's circumstances have so changed as to make it unreasonable or impossible" to rehire him.

Thus Congress, evidently considering that there were significant differences in industrial and governmental employment practices and potentialities, imposed obligations to rehire returning veterans of a markedly different nature upon government and private employers. It did not define the "unreasonable or impossible" circumstances that might relieve a private employer of the duty to rehire veterans, nor need we attempt to do so now. But it is plain that such circumstances might conceivably be such as seriously to affect, not only the reasonableness and possibility of rehiring, but also the reasonableness and possibility of retaining him for a full year's continuous work. For this reason, among others, interpretation of § 8 (c)'s prohibition against discharge of a returning veteran must be made in light of whether he returns to a government-guaranteed or to a private non-guaranteed job. Therefore § 8 (c)'s prohibition against "discharge" by a private employer cannot be accepted as determinative of the scope of the congressional prohibition against "discharge" by the Government.

The foregoing distinction is illustrated by the fact that civil service workers, unlike the private employees in the *Fishgold* case, are not confronted by a situation in which their employer, the Government, has an outstanding contract with them providing that they shall be retained in service in proportion to their "length of service" as reductions in force become necessary. Whatever seniority rights government employees have when discharges or reductions in force are made depend entirely upon congressional acts and regulations issued in harmony with them. See 37 Stat. 555, 5 U. S. C. § 652. We have discovered no acts or regulations which can be construed to recognize a nonveteran's length of government service as a factor sufficient to override the requirement of § 8 (b) (A) and § 8 (c) that a veteran must be restored to his old job with the Federal Government and cannot be discharged therefrom without cause for one year. Thus, unlike the employees in the *Fishgold* case whose private-employment contract-derived seniority prevented their being laid off, petitioner has no comparable statutorily derived seniority rights to his job with the Government. Petitioner argues, however, that § 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. § 861, in effect amended § 8 and conferred retention rights upon him based upon his length of service. For the reasons we give below in discussing the validity of Subgroup A–1, we think this contention is without merit.

Finally, the *Fishgold* decision held only that a temporary layoff did not violate a veteran's right under § 8 (c) not to be discharged without cause for one year after he had been restored to his old job. Here the petitioner asserts that the statutory one-year prohibition against discharge confers upon a reemployed veteran no security from a furlough for one year without pay, that such a furlough is not a "discharge" within the meaning of

§ 8 (c). The Commission has here treated a furlough of more than thirty days as the equivalent of a discharge. This is in accordance with prior governmental practice which has considered that the furlough of a veteran with military preference violates regulations providing that he shall not be "discharged or dropped" when "reductions in force are being made." [3] Moreover, § 14 of the Veterans' Preference Act, which safeguards preference eligibles against administrative denial of their preference rights, specifically places furloughs and suspensions for more than thirty days without pay on the same basis as discharges. Thus, the common meaning of furlough in governmental practice is not the same as that which the Court in the *Fishgold* case found to be the meaning of "layoffs" and "furloughs" in "industrial parlance." To give this one-year "furlough" any less meaning than the statutory word "discharge" would result in depriving government employee veterans of the entire congressional guarantee of a year's retention in their old jobs. We hold that the furlough, if applied to veterans, would be a "discharge" within the meaning of § 8 (c). Consequently, the Commission acted within its statutory duty by providing veterans a preference against such removals by establishing Subgroup A–1 Plus.

Third. Petitioner strongly urges invalidity of Subgroup A–1, which gives all permanent employee "Veterans with 'good' or higher efficiency ratings" retention preferences over all nonveterans, even over nonveterans with higher efficiency ratings and longer government service. While conceding that under some limited circumstances veterans with "good or higher ratings" are granted preference by § 12 of the Veterans' Preference Act of 1944, petitioner

[3] See 40 Ops. Atty. Gen., No. 115 (Sept. 20, 1946), p. 7, referring to Opinion, Attorney General Mitchell in 1929, interpreting Executive Order 5068, March 2, 1929. The substance of that Order is set out in this opinion at p. 337.

argues that the section does not require but actually prohibits any preference for veterans over nonveterans which fails to give substantial weight to a nonveteran's longer government service. The Government urges that the section requires an absolute retention preference for veterans who have the required efficiency ratings without regard to the fact that nonveterans may have had longer government service. An alternative argument is that, whether absolutely required or not, the Commission's subgrouping is well within the power to promulgate "rules and regulations" specifically authorized by § 12. The question presented is therefore one of interpretation of the relevant language of § 12.

The part of the section on which petitioner particularly relies reads:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service . . ."

Petitioner interprets this portion of § 12 as a congressional command that the Commission must invariably give "due effect" to length of service in determining what employees, whether veterans or nonveterans, shall first be discharged in a reduction-of-force program. In effect he argues that the above language provides no other "military preference" in civil service for a veteran employee over a nonveteran with greater "length of service" than that defined in the above proviso, namely, that the length of a veteran's army service shall be credited in computing the length of his total government service.

The part of § 12 on which the Government supports the Commission's recognition of a veteran's absolute retention preference without regard to comparative length of service of veterans and nonveterans follows immediately after that section's language on which petitioner relies, and reads:

> ". . . *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings . . . ."

The Government interprets this proviso as a special withdrawal of the proviso-defined classes of veterans from the general terms of the first clause of § 12 relating to "length of service." It views this proviso as the congressional creation of classes of veterans' "preference employees" [4] who "shall," if they have the defined efficiency ratings, "be retained in preference to all other competing employees" without regard to length of service as between veterans and nonveterans. Thus, under the government's interpretation, length of service would be given the "due effect" required by the first clause of § 12 by its consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. This interpretation of the proviso and the section, it is argued, would give meaning to all the language used in them, is plainly called for by the language, and harmonizes this portion of the Act with all its other parts and with the Act's broad purposes. The interpretation is compelled, so the

[4] The Act not only provides preferences for veterans but under certain circumstances grants preferences to veterans' wives, widows and mothers. § 2, 5 U. S. C. § 851, as amended by 62 Stat. 3. See H. R. Rep. No. 1289, 78th Cong., 2d Sess. 3.

Government argues, by the Act's legislative history, particularly when the proviso and preceding clauses in the section are viewed in the light of a long series of prior congressional enactments and authorized executive orders granting preferences in government employment to veterans and their close relatives. We agree with the Government that in the light of the foregoing factors no other interpretation of the pertinent parts of the section can fairly be reached.

In 1876, seventy-two years ago, Congress passed a law which required any executive department when making "any reduction of force" to "retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors." 19 Stat. 143, 169; 5 U. S. C. § 37.[5] In 1912 Congress greatly strengthened the old 1876 policy by providing that "in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary." 37 Stat. 360, 413.[6] There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of "good." Length of service in no way qualified the

[5] Disabled veterans had been granted employment preferences in 1865. 13 Stat. 571. This statutory policy was expressly preserved by § 7 of the Civil Service Act of 1883, 22 Stat. 403, 406, 5 U. S. C. § 638, was carried forward in other Acts, and has been repeated in a most comprehensive manner in § 2 of the Veterans' Preference Act of 1944.

[6] It is of interest that this legislative expression, like the one before us, was a proviso in a section, and that the section as a whole had to do with the manner in which the Civil Service Commission should provide for efficiency ratings in relation to promotions, demotions and dismissals of civil service employees.

preference given the veteran. And subsequent executive orders not only recognized this provision as giving veterans an absolute preference,[7] but also extended the preference to veterans in the field service [8] and to positions not under civil service.[9]

Executive Order 4240 of June 4, 1925, as amended by Executive Order 5068 of March 2, 1929, provided, as does Subgroup A–1 here, an absolute retention preference for veterans over nonveterans where the veterans' efficiency ratings were "good," and a similar absolute preference over nonveterans whose ratings were less than good if the veterans' ratings were equal to those of the nonveterans. And at the time of passage of the Veterans' Preference Act of 1944, there were 1943 Civil Service Regulations outstanding [10] which granted veterans with permanent tenure and with a rating of "good" or higher, precisely the same absolute retention preference over nonveterans which is now afforded by Subgroup A–1, here attacked as invalid. Consequently, a holding that veterans with a rating of "good" no longer have a retention preference over nonveterans with longer service, would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel. The purpose of that Act's sponsors and of Congress in passing it appears to have been precisely the opposite—to broaden rather than narrow the preference.

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[7] § 7, Executive Order 3567, October 24, 1921.

[8] Executive Order 3801, March 3, 1923.

[9] Departmental Circular 146, U. S. Civil Service Comm'n, October 22, 1936.

[10] 5 Code Fed. Reg. (Supp. 1943) §§ 12.301–12.313. These regulations, like those attacked here, separated all civil service employees into different categories according to their tenure, with permanent mployees having the highest retention status. Thus all permanent mployees, regardless of veterans' preference and of efficiency rating, enjoyed priority over all employees with limited tenures.

The Senate Civil Service Committee was told by the congressional sponsor of the measure that "this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden, and implements the veterans' preference policy heretofore in effect," and that it would "give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government . . . ." [11] A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the "heart of the section," [12] and stated that it was "substantially the same" as the 1912 Act,[13] which, as before pointed out, provided for an absolute veterans' retention preference without regard to length of service.[14] And in explaining the Bill on the floor of the House, the sponsor and active proponents of the measure explained

[11] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8–9.

[12] *Id.* at 29.

[13] *Id.* at 27, 29.

[14] Three veterans' organizations collaborated with the legislative sponsors in drafting the Act. Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8. A representative of one of these organizations stated to the Committee: "This measure gives to honorably discharged veterans of World War I and World War II, their widows, and the wives of disabled veterans who themselves are not qualified, preference in employment where Federal funds are disbursed. It provides, by law, a definite preference both in appointment and retention in Federal positions. While such a preference in many instances now exists by virtue of Executive orders and Civil Service Commission regulations, this bill gives such preference a permanent standing that cannot be changed except by congressional action. The bill, likewise, does not take away from the veteran any rights previously granted under any existing law, Executive order, civil-service rule, or regulation of any department of the Government, but prescribes by law additional preferences and confirms many now existing by regulation." *Id.* at 41–42.

it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders.[15]

Not only did the friends of the Veterans' Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing the Civil Service Reform League said: "I think you ought to give consideration to . . . retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service." [16] And another witness against the Bill pointed out that under it nonveterans would "be the first to be laid off and the last to be taken on." [17]

Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy.[18]

Affirmed.

MR. JUSTICE REED, concurring.

I agree with the conclusion reached by the Court in this case. My disagreement with the opinion is limited

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[15] 90 Cong. Rec. 3502, 3503, 3505.

[16] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 33–34.

[17] *Id.* at 63, 65.

[18] It is worthy of note, however, that Congress, in recognition of hardships resulting from replacement of older government employees

to that portion of subdivision *Second* which indicates that the rights of a veteran as to discharge after restoration to employment by the United States differ from the corresponding rights of a veteran restored to employment by a private employer.

The rights to retention of employment of both veterans are governed by the same subsection 8 (c). 54 Stat. 890, 50 U. S. C. § 308. Section 8 (c) specifies the same conditions for retention of employment for all employees whether they are reemployed by the United States or by private employers.

Nothing has come to my attention that indicates to me a congressional purpose to grant to one more rights as to continuity of employment than to the other. The legislation as to both depended upon the same constitutional authority—the War Power. I can see no reason to attribute to Congress an intention to guarantee public employment to a returning veteran regardless of the needs of the public service or to discriminate between equally deserving veterans. Compare *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON join in this opinion.

MR. JUSTICE RUTLEDGE, concurring.

I concur in the result. But I do so without expressing opinion concerning the validity of Subgroup A–1 Plus of the Regulations. That classification, as I understand it and the Court's construction of it, gives preference for retention for one year in governmental work to vet-

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by veterans, has passed Acts which grant special pensions to employees over 55 years of age who have worked for the Government for 25 years or more and who have been involuntarily separated from the service in reductions in force. 60 Stat. 939, 5 U. S. C. § 691e; 62 Stat. 48. See 92 Cong. Rec. 9201–9202, H. R. Rep. No. 2443, 79th Cong., 2d Sess. 1; S. Rep. No. 1678, 79th Cong., 2d Sess. 1–2.

erans of World War II over all others, including veterans of World War I, regardless of efficiency and length of service whether of the restored veteran or of his competitors. It may be that upon the sum of the legislation Congress intended to give so broad a priority to returning members of the military services. But if so, it is the one instance in which both efficiency and length of service have been absolutely disregarded. And it is at least possible, I think, to read the complex series of statutes bearing on the problem as not having been intended to go so far.

But I do not reach that question, because Subgroup A–1 does take account of efficiency. It gives preference to veterans unless their efficiency rating is less than "good." No specific mention of length of service is made. But while a classification which ignores all considerations both of efficiency and of length of service might be found unauthorized under the statutory scheme,[1] one which takes due account of efficiency, which is not wholly unrelated to length of service, well might be sustained. And in that event the Commission's judgment that veterans with efficiency ratings of "good" or better should be preferred to all others could hardly be called arbitrary or in excess of the authority conferred.[2]

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[1] Depending upon whether § 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. App. § 308, requiring restoration to employment and forbidding discharge without cause for one year, has been qualified by the later enactment of § 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. (Supp. V, 1946) § 861, quoted in the Court's opinion, particularly the second proviso. See note 2.

[2] The second proviso, cf. note 1, specifies that preference employees (*i. e.*, veterans) with efficiency ratings of "good" or better shall be retained in preference to "all other competing employees," a designation certainly of the most comprehensive scope. The very terms of the section appear thus to place much greater stress upon efficiency ratings than upon length of service.

It is true that when petitioner was separated from service there were some 61 veterans classified A–1 Plus, without efficiency ratings and in priority to himself.[3] But we are informed, and it is not disputed,[4] that 60 of these men now have received efficiency ratings of "good," and therefore fall into Group A–1 in any event. The other of the 61 has resigned. Hence we are told, and this also is not disputed, that any order of the District Court purporting to require petitioner's restoration would mean that he is entitled to displace one of those veterans.

Since in my view Regulation A–1 is valid, regardless of whether A–1 Plus should stand, and since on the facts now before us Regulation A–1 is sufficient to exclude petitioner from restoration at this time, I do not think he has made a sufficient showing to call forth the exercise of our discretionary power in this proceeding to require the Commission to reformulate the Regulations. Upon the showing made the case is not one appropriate, in my judgment, for application of the discretionary remedy of a declaratory judgment.

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[3] The practice in relation to these positions has been to withhold efficiency ratings, in this case, for a period of six months, and then to award them on the basis of actual performance.

[4] Ordinarily, of course, rights are to be determined as of the time the interests involved are adversely affected. But it would seem hardly consistent with the legislative scheme that employees with deferred status could defeat the use of a reasonable period to determine the veteran's efficiency rating by actual performance. In any event, the discretionary declaratory judgment remedy should not be applied to oust preference employees entitled to priority over others, even though their status as preference employees is established after trial but before final disposition of the cause on appellate review.

SHERRER *v.* SHERRER.

CERTIORARI TO THE PROBATE COURT FOR BERKSHIRE COUNTY, MASSACHUSETTS.

No. 36. Argued October 13–14, 1947.—Decided June 7, 1948.

A wife went from her Massachusetts home to Florida and sued for divorce in a court of that State a few days after the expiration of the 90-day period of residence required by Florida law. Her husband appeared generally and denied all the allegations in the complaint, including that of the wife's Florida residence. At the hearing, the wife introduced evidence to establish her Florida residence, and the husband, though present in person and by counsel, did not cross-examine or proffer evidence in rebuttal. The court found that the wife was a bona fide resident of Florida and granted her a divorce. The husband did not appeal. The wife married again and subsequently returned to Massachusetts. Her former husband then instituted proceedings there collaterally attacking the Florida decree. Although there was no indication that the decree would have been subject to such an attack under Florida law, the Massachusetts court found that the wife was never domiciled in Florida and held the divorce void. *Held:* The Massachusetts judgment denied full faith and credit to the Florida judgment, contrary to Art. IV, § 1 of the Constitution and the Act of May 26, 1790, 28 U. S. C. § 687. Pp. 344–356.

(a) The husband had his day in court in Florida with respect to every issue involved in the litigation, and there is nothing in the concept of due process which demands that he be given a second opportunity to litigate the existence of the jurisdictional facts. P. 348.

(b) The requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree. *Davis* v. *Davis,* 305 U. S. 32, followed. *Williams* v. *North Carolina,* 325 U. S. 226, distinguished. Pp. 348–352.

(c) Insofar as the rule of *Andrews* v. *Andrews,* 188 U. S. 14, may be said to be inconsistent with the judgment herein announced,

it must be regarded as having been superseded by subsequent decisions of this Court. Pp. 352–353.

(d) If the application of the full faith and credit clause to cases of this nature requires that local policy be subordinated, that is a part of the price of our federal system. That vital interests are involved in divorce litigation makes it a matter of greater rather than lesser importance that under the circumstances of this case the litigation end in the courts of the State in which the decree was rendered. Pp. 354–356.

320 Mass. 351, 69 N. E. 2d 801, reversed.

After a wife had obtained a divorce in Florida, and had returned to her former home in Massachusetts, a probate court in Massachusetts found that she was never domiciled in Florida and held the divorce void. The Supreme Judicial Court of Massachusetts affirmed. 320 Mass. 351, 69 N. E. 2d 801. This Court granted certiorari. 330 U. S. 814. *Reversed,* p. 356.

Frederick M. Myers argued the cause for petitioner. With him on the brief was *Francis J. Quirico.*

Lincoln S. Cain and *Robert T. Capeless* argued the cause for respondent. With him on the brief was *James M. Carroll.*

Mr. Chief Justice Vinson delivered the opinion of the Court.

We granted certiorari in this case and in *Coe* v. *Coe, post,* p. 378, to consider the contention of petitioners that Massachusetts has failed to accord full faith and credit to decrees of divorce rendered by courts of sister States.[1]

[1] U. S. Const. Art. IV, § 1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Act of May 26, 1790, 1 Stat. 122, as amended, R. S. § 905, 28 U. S. C. § 687, provides in part: ". . . And the said records and

Petitioner Margaret E. Sherrer and the respondent, Edward C. Sherrer, were married in New Jersey in 1930, and from 1932 until April 3, 1944, lived together in Monterey, Massachusetts. Following a long period of marital discord, petitioner, accompanied by the two children of the marriage, left Massachusetts on the latter date, ostensibly for the purpose of spending a vacation in the State of Florida. Shortly after her arrival in Florida, however, petitioner informed her husband that she did not intend to return to him. Petitioner obtained housing accommodations in Florida, placed her older child in school, and secured employment for herself.

On July 6, 1944, a bill of complaint for divorce was filed at petitioner's direction in the Circuit Court of the Sixth Judicial Circuit of the State of Florida.[2] The bill alleged extreme cruelty as grounds for divorce and also alleged that petitioner was a "bona fide legal resident of the State of Florida." [3] The respondent received notice by mail of the pendency of the divorce proceedings. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's com-

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judicial proceedings . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

[2] By statute, the Circuit Courts, as courts of equity, have jurisdiction of divorce causes. Florida Stat. Ann. § 65.01. *Meloche* v. *Meloche*, 101 Fla. 659, 662, 133 So. 339, 340 (1931).

[3] Section 65.02 of Florida Stat. Ann. provides: "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint." The Florida courts have construed the statutory requirement of residence to be that of domicile. Respondent does not contend nor do we find any evidence that the requirements of "domicile" as defined by the Florida cases are other than those generally applied or differ from the tests employed by the Massachusetts courts. *Wade* v. *Wade*, 93 Fla. 1004, 113 So. 374 (1927); *Evans* v. *Evans*, 141 Fla. 860, 194 So. 215 (1940); *Fowler* v. *Fowler*, 156 Fla. 316, 22 So. 2d 817 (1945).

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plaint, including the allegation as to petitioner's Florida residence.[4]

On November 14, 1944, hearings were held in the divorce proceedings. Respondent appeared personally to testify with respect to a stipulation entered into by the parties relating to the custody of the children.[5] Throughout the entire proceedings respondent was represented by counsel.[6] Petitioner introduced evidence to establish her Florida residence and testified generally to the allegations of her complaint. Counsel for respondent failed to cross-examine or to introduce evidence in rebuttal.

The Florida court on November 29, 1944, entered a decree of divorce after specifically finding that petitioner "is a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause; . . ." Respondent failed to challenge the decree by appeal to the Florida Supreme Court.[7]

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[4] The first allegation of respondent's answer stated: "That the Plaintiff is not a bona-fide legal resident of the State of Florida and has not been such continuously for more than the ninety days immediately preceding the filing of the bill of complaint. That on or about April 3, 1944, while the parties were living together as residents of Monterey, Massachusetts, the Plaintiff came to Florida with the children of the parties for a visit and without any expressed intention of establishing a separate residence from the Defendant and has remained in Florida ever since, but without any intention of becoming a bona-fide resident of Florida."

[5] The agreement provided that respondent should have custody of the children during the school term of each year and that petitioner should be given custody throughout the rest of the year, subject to the right of both parents to visit at reasonable times. Before the final decree of divorce was entered, respondent returned to Massachusetts accompanied by the two children.

[6] It is said that throughout most of the proceedings respondent did not appear in the courtroom but remained "in a side room."

[7] Appeals lie to the Florida Supreme Court from final decrees of divorce. Fla. Const. Art. V, § 5. And see *e. g., Homan* v. *Homan,* 144 Fla. 371, 198 So. 20 (1940).

On December 1, 1944, petitioner was married in Florida to one Henry A. Phelps, whom petitioner had known while both were residing in Massachusetts and who had come to Florida shortly after petitioner's arrival in that State. Phelps and petitioner lived together as husband and wife in Florida, where they were both employed, until February 5, 1945, when they returned to Massachusetts.

In June, 1945, respondent instituted an action in the Probate Court of Berkshire County, Massachusetts, which has given rise to the issues of this case. Respondent alleged that he is the lawful husband of petitioner, that the Florida decree of divorce is invalid, and that petitioner's subsequent marriage is void. Respondent prayed that he might be permitted to convey his real estate as if he were sole and that the court declare that he was living apart from his wife for justifiable cause.[8] Petitioner joined issue on respondent's allegations.

In the proceedings which followed, petitioner gave testimony in defense of the validity of the Florida divorce decree.[9] The Probate Court, however, resolved the issues of fact adversely to petitioner's contentions, found that

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[8] The action was brought pursuant to the provisions of Mass. Gen. Laws (Ter. Ed.) c. 209, § 36.

[9] Petitioner testified that for many years prior to her departure for Florida, respondent had made frequent allusions to the fact that petitioner's mother had been committed to a mental institution and had suggested that petitioner was revealing the same traits of mental instability. Petitioner testified that as a result of these remarks and other acts of cruelty, her health had been undermined and that it had therefore beeome necessary for her to leave respondent. In order to insure her departure, she had represented that her stay in Florida was to be only temporary, but from the outset she had in fact intended not to return. Petitioner testified further that both before and after the Florida decree of divorce had been entered, she had intended to reside permanently in Florida and that she and Phelps had returned to Massachusetts only after receiving a letter stating that Phelps' father was in poor health.

she was never domiciled in Florida, and granted respondent the relief he had requested. The Supreme Judicial Court of Massachusetts affirmed the decree on the grounds that it was supported by the evidence and that the requirements of full faith and credit did not preclude the Massachusetts courts from reexamining the finding of domicile made by the Florida court.[10]

At the outset, it should be observed that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process. We do not understand respondent to urge the contrary. The respondent personally appeared in the Florida proceedings. Through his attorney he filed pleadings denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25 (1917); *Baldwin* v. *Iowa Traveling Men's Assn.,* 283 U. S. 522 (1931).

It should also be observed that there has been no suggestion that under the law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts court. The implicit assumption underlying the position taken by respondent and the Massachusetts court is that this case involves a decree of divorce valid

[10] 320 Mass. 351, 69 N. E. 2d 801 (1946).

and final in the State which rendered it; and we so assume.[11]

That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that State is not disputed.[12] This requirement was recognized by the Florida court which rendered the divorce decree, and the principle has been given frequent application in decisions of the State Supreme Court.[13] But whether or not petitioner was domiciled in Florida at the time the divorce was granted was a matter to be resolved by judicial determination. Here, unlike the situation presented in *Williams* v. *North Carolina,* 325 U. S. 226 (1945), the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented by this case may, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings.

The question of what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, where the judgment of that court is subsequently

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[11] See *Williams* v. *North Carolina,* 325 U. S. 226, 233–234 (1945); *cf. Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 78, note 26 (1939). No Florida case has been called to our attention involving a collateral attack on a divorce decree questioning the domicile of the parties, and hence the jurisdiction of the court which entered the decree, where both parties appeared in the divorce proceedings. See generally *Everette* v. *Petteway,* 131 Fla. 516, 528–529, 179 So. 666, 671–672 (1938); *State ex rel. Goodrich Co.* v. *Trammell,* 140 Fla. 500, 505, 192 So. 175, 177 (1939). But *cf. Chisholm* v. *Chisholm,* 98 Fla. 1196, 125 So. 694 (1929); *Dye* v. *Dolbeck,* 114 Fla. 866, 154 So. 847 (1934), involving attacks on jurisdictional findings made in *ex parte* divorce proceedings.

[12] *Bell* v. *Bell,* 181 U. S. 175 (1901).

[13] See note 3 *supra.*

subjected to collateral attack on jurisdictional grounds, has been given frequent consideration by this Court over a period of many years. Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate.[14] The reasons for this doctrine have frequently been stated. Thus in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938), it was said: "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

This Court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack.[15]

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[14] *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1931); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Jackson* v. *Irving Trust Co.*, 311 U. S. 494 (1941). And see *Forsyth* v. *Hammond*, 166 U. S. 506 (1897); *Heiser* v. *Woodruff*, 327 U. S. 726 (1946).

[15] *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939). And see *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25 (1917).

In *Davis* v. *Davis,* 305 U. S. 32 (1938), the courts of the District of Columbia had refused to give effect to a decree of absolute divorce rendered in Virginia, on the ground that the Virginia court had lacked jurisdiction despite the fact that the defendant had appeared in the Virginia proceedings and had fully litigated the issue of the plaintiff's domicile. This Court held that in failing to give recognition to the Virginia decree, the courts of the District had failed to accord the full faith and credit required by the Constitution. During the course of the opinion, this Court stated: "As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation." [16]

We believe that the decision of this Court in the *Davis* case and those in related situations [17] are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible

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[16] *Davis* v. *Davis,* 305 U. S. 32, 40 (1938). And see *Stoll* v. *Gottlieb,* 305 U. S. 165, 172, note 13 (1938).

[17] See cases discussed *supra.*

to such collateral attack in the courts of the State which rendered the decree.[18]

Applying these principles to this case, we hold that the Massachusetts courts erred in permitting the Florida divorce decree to be subjected to attack on the ground that petitioner was not domiciled in Florida at the time the decree was entered. Respondent participated in the Florida proceedings by entering a general appearance, filing pleadings placing in issue the very matters he sought subsequently to contest in the Massachusetts courts, personally appearing before the Florida court and giving testimony in the case, and by retaining attorneys who represented him throughout the entire proceedings. It has not been contended that respondent was given less than a full opportunity to contest the issue of petitioner's domicile or any other issue relevant to the litigation. There is nothing to indicate that the Florida court would not have evaluated fairly and in good faith all relevant evidence submitted to it. Respondent does not even contend that on the basis of the evidence introduced in the Florida proceedings, that court reached an erroneous result on the issue of petitioner's domicile. If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered.

It is suggested, however, that *Andrews* v. *Andrews*, 188 U. S. 14 (1903), militates against the result we have reached. In that case a husband, who had been domiciled in Massachusetts, instituted divorce proceedings in

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[18] We, of course, intimate no opinion as to the scope of Congressional power to legislate under Article IV, § 1 of the Constitution. See note 1 *supra*.

a South Dakota court after having satisfied the residence requirements of that State. The wife appeared by counsel and filed pleadings challenging the husband's South Dakota domicile. Before the decree of divorce was granted, however, the wife, pursuant to a consent agreement between the parties, withdrew her appearance from the proceedings. Following the entry of the decree, the husband returned to Massachusetts and subsequently remarried. After his death a contest developed between his first and second wives as to the administration of the husband's estate. The Massachusetts court concluded that the South Dakota decree of divorce was void on the ground that the husband had not been domiciled in that State and that, under the applicable statutes of Massachusetts, the Massachusetts courts were not required to give recognition to such a decree. This Court affirmed on writ of error by a divided vote.[19]

On its facts, the *Andrews* case presents variations from the present situation.[20] But insofar as the rule of that case may be said to be inconsistent with the judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court. The *Andrews* case was decided prior to the considerable modern development of the law with respect to finality of jurisdictional findings.[21] One of the decisions upon which the majority of the Court in that case placed primary reliance, *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (1888), was, insofar as pertinent, overruled in *Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935). The *Andrews* case, therefore, may not be regarded as determinative of the issues before us.

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[19] Justices Brewer, Shiras, and Peckham dissented. Mr. Justice Holmes took no part in the case.

[20] Thus, in the *Andrews* case, before the divorce decree was entered by the South Dakota court, the defendant withdrew her appearance in accordance with a consent agreement.

[21] See note 14 *supra*.

It is urged further, however, that because we are dealing with litigation involving the dissolution of the marital relation, a different result is demanded from that which might properly be reached if this case were concerned with other types of litigation. It is pointed out that under the Constitution the regulation and control of marital and family relationships are reserved to the States. It is urged, and properly so, that the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance. Finally, it is contended that a recognition of the importance to the States of such powers demands that the requirements of full faith and credit be viewed in such a light as to permit an attack upon a divorce decree granted by a court of a sister State under the circumstances of this case even where the attack is initiated in a suit brought by the defendant in the original proceedings.[22]

But the recognition of the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter does not resolve the issues of this case. This is not a situation in which a State has merely sought to exert such power over a domiciliary. This is, rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital. In resolving the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters. Nor do we understand the decisions of this Court to support the proposition that the obligation imposed by Article IV, § 1 of the Constitution and the Act of Congress passed thereunder amounts to something less than the duty to accord *full* faith and credit to decrees of

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[22] But *cf. Williams* v. *North Carolina*, 325 U. S. 226, 230 (1945).

divorce entered by courts of sister States.[23] The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.[24] If in its application local policy must at times be required to give way, such "is part of the price of our federal system." *Williams* v. *North Carolina*, 317 U. S. 287, 302 (1942).[25]

This is not to say that in no case may an area be recognized in which reasonable accommodations of interest may properly be made. But as this Court has heretofore made clear, that area is of limited extent.[26] We believe that in permitting an attack on the Florida divorce decree which again put in issue petitioner's Florida domicile and in refusing to recognize the validity of that decree, the Massachusetts courts have asserted a power which cannot be reconciled with the requirements of due faith and credit. We believe that assurances that such a power will be exercised sparingly and wisely render it no less repugnant to the constitutional commands.

It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such

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[23] *Davis* v. *Davis*, 305 U. S. 32, 40 (1938); *Williams* v. *North Carolina*, 317 U. S. 287, 294 (1942).

[24] *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276–277 (1935); *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 439 (1943).

[25] But we may well doubt that the judgment which we herein announce will amount to substantial interference with state policy with respect to divorce. Many States which have had occasion to consider the matter have already recognized the impropriety of permitting a collateral attack on an out-of-state divorce decree where the defendant appeared and participated in the divorce proceedings. See, *e. g.*, *Norris* v. *Norris*, 200 Minn. 246, 273 N. W. 708 (1937); *Miller* v. *Miller*, 65 N. Y. S. 2d 696 (1946), affirmed 271 App. Div. 974, 67 N. Y. S. 2d 379 (1947); *Cole* v. *Cole*, 96 N. J. Eq. 206, 124 A. 359 (1924).

[26] *Broderick* v. *Rosner*, 294 U. S. 629, 642 (1935); *Williams* v. *North Carolina*, 317 U. S. 287, 294–295 (1942).

findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings.[27] It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation.[28] And where a decree of divorce is rendered by a competent court under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered.

Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MURPHY concurs, dissenting.*

What Mr. Justice Holmes said of the ill-starred *Haddock* v. *Haddock* may equally be said here: "I do not suppose that civilization will come to an end whichever way this case is decided." 201 U. S. 562, 628. But, believing as I do that the decision just announced is calculated, however unwittingly, to promote perjury without

[27] *Williams* v. *North Carolina*, 325 U. S. 226 (1945).

[28] Cf. *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938).

*[This is also a dissent to *Coe* v. *Coe*, *post*, p. 378.]

otherwise appreciably affecting the existing disharmonies among the forty-eight States in relation to divorce, I deem it appropriate to state my views.

Not only is today's decision fraught with the likelihood of untoward consequences. It disregards a law that for a century has expressed the social policy of Massachusetts, and latterly of other States, in a domain which under our Constitution is peculiarly the concern of the States and not of the Nation.

If all that were necessary in order to decide the validity in one State of a divorce granted in another was to read the Full Faith and Credit Clause of the Constitution, generations of judges would not have found the problem so troublesome as they have, nor would a divided Court have successively pronounced a series of discordant decisions. "Full faith and credit" must be given to a judgment of a sister State. But a "judgment" implies the power of the State to deal with the subject-matter in controversy. A State court which has entered what professes to be a judgment must have had something on which to act. That something is what is conveyed by the word "jurisdiction," and, when it comes to dissolving a marriage status, throughout the English-speaking world the basis of power to act is domicile. Whether or not in a particular situation a person is domiciled in a given State depends on circumstances, and circumstances have myriad diversities. But there is a consensus of opinion among English-speaking courts the world over that domicile requires some sense of permanence of connection between the individual who claims it and the State which he asks to recognize it.

It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such cer-

tainly has not been the law since 1873. *Thompson* v. *Whitman,* 18 Wall. 457. Nor was it the law when this Court last considered the divorce problem, in 1945. *Williams* v. *North Carolina,* 325 U. S. 226. A State that is asked to enforce the action of another State may appropriately ascertain whether that other State had power to do what it purported to do. And if the enforcing State has an interest under our Constitution in regard to the subject-matter that is vital and intimate, it should not be within the power of private parties to foreclose that interest by their private arrangement. *Andrews* v. *Andrews,* 188 U. S. 14; cf. *Fall* v. *Eastin,* 215 U. S. 1; *Alaska Packers Association* v. *Industrial Accident Commission,* 294 U. S. 532.

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers. Therefore, the constitutional power of a State to determine the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another State, even though in other types of controversy considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.[1] I cannot agree that the Constitution forbids

[1] Nor do I regard *Davis* v. *Davis,* 305 U. S. 32, as contrary authority. That case did not depend for its result on the fact that there had been an adjudication of the jurisdiction of the court rendering the divorce enforced, inasmuch as this Court found that the State granting the divorce was in fact that of the domicile. 305 U. S. at 41. Moreover this Court's citation therein of *Andrews* v. *Andrews,*

a State from insisting that it is not bound by any such proceedings in a distant State wanting in the power that domicile alone gives, and that its courts need not honor such an intrinsically sham proceeding, no matter who brings the issue to their attention.

That society has a vital interest in the domestic relations of its members will be almost impatiently conceded.[2] But it is not enough to pay lip-service to the commonplace as an abstraction. Its implications must be respected. They define our problems. Nowhere in the United States, not even in the States which grant divorces most freely, may a husband and wife rescind their marriage at will as they might a commercial contract. Even if one thought that such a view of the institution of marriage was socially desirable, it could scarcely be held that such a personal view was incorporated into the Constitution or into the law for the enforcement of the Full Faith and Credit Clause, enacted by the First Congress. 1 Stat. 122, 28 U. S. C. § 687. That when the Constitution was ordained divorce was a matter of the deepest public concern, rather than deemed a personal dispute between private parties, is shown by the fact that it could be secured almost exclusively only by special enactments of the several legislatures and not through litigation in court. See Ireland and Galindez, Divorce in the Americas (1947) p. 1.

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supra, indicates an absence of intention to overrule the holding of that case that opportunity to litigate the issue of domicile does not foreclose inquiry as to the true facts. *Andrews* v. *Andrews* has since been cited with respect, as recently as *Williams* v. *North Carolina,* 317 U. S. 287, 309, 320, n. 7, and 325 U. S. 226, 229, 240, 242.

[2] Compare the English laws providing for a King's Proctor to represent the interests of the Crown in divorce proceedings. Sections 5–7, Matrimonial Causes Act, 1860, 23 & 24 VICT., c. 144; § 1, Matrimonial Causes Act, 1873, 36 & 37 VICT., c. 31; § 181, The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 GEO. 5, c. 49, 9 Halsbury's Statutes of England 393–94.

As a contract, the marriage contract is unique in the law. To assimilate it to an ordinary private contract can only mislead. See *Maynard* v. *Hill,* 125 U. S. 190, 210–14; Restatement of the Law, Contracts, §§ 584, 586; cf. *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 627–29. The parties to a marriage do not comprehend between them all the interests that the relation contains. Society sanctions the institution and creates and enforces its benefits and duties. As a matter of law, society is represented by the permanent home State of the parties, in other words, that of their domicile. In these cases that State was Massachusetts.

Massachusetts has seen fit to subject its citizens to the following law:

> "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." Mass. Gen. Laws c. 208, § 39 (1932).

This statute, in substance,[3] was first enacted in 1835,

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[3] Rev. L. 1835, c. 76:

§ 39. "When any inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause, which had occurred here, and whilst the parties resided here, or for any cause, which would not authorize a divorce, by the laws of this state, a divorce so obtained shall be of no force or effect in this state."

§ 40. "In all other cases, a divorce decreed in any other state or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state."

and even then merely formalized a prior rule of judicial origin. Cf. *Hanover* v. *Turner,* 14 Mass. 227; Report of the Commissioners Appointed to Revise the General Statutes of the Commonwealth, pt. II, p. 123; 2 Kent, Commentaries, Lect. 27, *108–*109. The Uniform Annulment of Marriages and Divorce Act,[4] passed by Delaware,[5] New Jersey,[6] and Wisconsin,[7] is almost identical, as is a Maine statute [8] on the same subject.

Massachusetts says through this statute that a person who enjoys its other institutions but is irked by its laws concerning the severance of the marriage tie, must either move his home to some other State with more congenial laws, or remain and abide by the laws of Massachusetts. He cannot play ducks and drakes with the State, by leaving it just long enough to take advantage of a proceeding elsewhere, devised in the interests of a quick divorce, intending all the time to retain Massachusetts as his home, and then return there, resume taking advantage of such of its institutions as he finds congenial but assert his freedom from the restraints of its policies concerning severance of the marriage tie. Massachusetts has a right to define the terms on which it will grant divorces, and to refuse to recognize divorces granted by other States to parties who at the time are still Massachusetts domiciliaries. Has it not also the right to frustrate evasion of its policies by those of its permanent residents who leave the State to change their spouses rather than to change their homes, merely because they go through a lukewarm or feigned contest over jurisdiction?

The nub of the *Williams* decision was that the State of domicile has an independent interest in the marital

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[4] See note 13, *infra.*

[5] Del. Rev. Code, c. 86, § 29 (1935).

[6] N. J. Stat. Ann. § 2:50:35 (1939).

[7] Wis. Stat. § 247.21 (1945).

[8] Me. Rev. Stat., c. 73, § 12 (1930).

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status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws. In the *Williams* case, it was not the interest of Mrs. Williams, or that of Mr. Hendryx, that North Carolina asserted. It was the interest of the people of North Carolina. The same is true here of the interest of Massachusetts.[9] While the State's interest may be expressed in criminal prosecutions, with itself formally a party as in the *Williams* case, the State also expresses its sovereign power when it speaks through its courts in a civil litigation between private parties. Cf. *Shelley* v. *Kraemer,* 334 U. S. 1.

Surely there is involved here an exercise by Massachusetts of its policy concerning the termination of marriage by its own citizens. The Framers left that power over domestic relations in the several States, and every effort to withdraw it from the States within the past sixty years has failed.[10] An American citizen may change his domicile from one State to another. And so, a State must respect another State's valid divorce decree even though it concerns its former citizens. But the real question here is whether the Full Faith and Credit Clause can be used as a limitation on the power of a State over its citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then

[9] The result of the assertion of the State's interest may be a windfall to a party who has sought to bargain his or her rights away and now seeks to renege on the agreement. This fact, however, should scarcely be allowed to stand in the way of the assertion by the State of its paramount concern in the matter. Such an unexpected windfall to a party, who by ethical standards may be regarded as undeserving, is a frequent consequence of findings of lack of jurisdiction. See Holmes, C. J., in *Andrews* v. *Andrews,* 176 Mass. 92, 96.

[10] See note 13, *infra.*

scurry back. To hold that this Massachusetts statute contravenes the Full Faith and Credit Clause is to say that that State has so slight a concern in the continuance or termination of the marital relationships of its domiciliaries that its interest may be foreclosed by an arranged litigation between the parties in which it was not represented.[11]

Today's decision may stir hope of contributing toward greater certainty of status of those divorced. But when people choose to avail themselves of laws laxer than those of the State in which they permanently abide, and where, barring only the interlude necessary to get a divorce, they choose to continue to abide, doubts and conflicts are inevitable, so long as the divorce laws of the forty-eight States remain diverse, and so long as we respect the law that a judgment without jurisdictional foundation is not constitutionally entitled to recognition everywhere. These are difficulties, as this Court has often reminded, inherent in our federal system, in which governmental power over domestic relations is not given to the central government. Uniformity regarding divorce is not within the power of this Court to achieve so long as "the domestic relations of husband and wife . . . were matters reserved to the States." *Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379,

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[11] Today's decision would also seem to render invalid, under the Full Faith and Credit Clause, a large proportion of the commonly encountered injunctions against a domiciliary prosecuting an out-of-State divorce action. Cf. *Kempson* v. *Kempson,* 58 N. J. Eq. 94, 61 N. J. Eq. 303, 63 N. J. Eq. 783; Pound, *The Progress of the Law—Equity,* 33 Harv. L. Rev. 420, 425–28; Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce,* 2 Law & Contemp. Prob. 370; Note, 13 Bklyn. L. Rev. 148. Since no State may enjoin its inhabitants from changing their domiciles in order to procure divorces, it would seem that henceforth a recital of domicile in the out-of-State divorce decree will render the injunction retroactively invalid if there has been any semblance of a contest in the divorce proceeding.

384; *In re Burrus,* 136 U. S. 586, 593–94.[12] And so long as the Congress has not exercised its powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees, this Court cannot through its adjudications achieve the result sought to be accomplished by a long train of abortive efforts at legislative and constitutional reform.[13] To attempt to shape policy so as to avoid disharmonies in our divorce laws

[12] The Massachusetts law is surely legislation within the field regulating the domestic relations of husband and wife, and, as such, within the scope of "matters reserved to the States." It can scarcely be doubted that if a constitutional amendment withdrew this field from the States and gave it to the Federal Government, an Act of Congress, making the same provision substantively as did Massachusetts, regarding divorces granted in countries other than the United States to citizens of this country, would be held constitutional. Such a law is not less a law concerning "the domestic relations of husband and wife," even though incidentally it may affect the force to be given to what appears to be a judgment of a sister State.

[13] Three modes of achieving uniformity have been attempted—adoption of a constitutional amendment authorizing Federal domestic relations legislation; Congressional action implementing the Full Faith and Credit Clause; and uniform State legislation. Such attempts were originally fostered by those who sought legislation rendering divorce uniformly *difficult* to obtain. See Lichtenberger, Divorce (1931) pp. 187 *et seq.;* Cavers, Foreword, 2 Law & Contemp. Prob. 289.

The first effort to amend the Constitution to empower Congress to enact domestic relations legislation uniform throughout the Nation was made in 1884. Since then at least seventy similar amendments have been proposed. Ames, The Proposed Amendments to the Constitution of the United States during the First Century of its History, [1896] Ann. Rep. American Historical Ass'n, reprinted as H. R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, p. 190; Sen. Doc. No. 93, 69th Cong., 1st Sess.; "Proposed Amendments to the Constitution of the United States Introduced in Congress from the 69th Congress, 2d Session through the 78th Congress, December 6, 1926, to December 19, 1944" (U. S. Govt. Printing Office, 1946). None has been favorably acted upon. See, *e. g.,* H. R. Rep. No. 1290, 52nd Cong., 1st Sess., p. 2, in which the majority of the House Judiciary Committee, reporting adversely on such a proposed amendment, pointed out that

was not a power entrusted to us, nor is the judiciary competent to exercise it. Courts are not equipped to pursue the paths for discovering wise policy. A court is

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Congress might achieve a measure of uniformity through exercise of its existing powers to implement the Full Faith and Credit Clause.

Suggestions that such a statute be enacted by Congress have not been lacking. See, *e. g.*, 52 Rep. A. B. A. 292, 319; Corwin, *The "Full Faith and Credit" Clause*, 81 U. of Pa. L. Rev. 371, 388; cf. Mr. Justice Stone, dissenting, in *Yarborough* v. *Yarborough*, 290 U. S. 202, 215, n. 2; Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 21. And Senator McCarran of Nevada is currently seeking to have such legislation adopted. See S. 1960, 80th Cong., 2d Sess.

The most vigorous efforts, however, have been made in the direction of securing uniform State legislation. President Theodore Roosevelt, in calling on Congress to provide for compilation of marriage and divorce statistics, included a suggestion of cooperation among the States in enacting uniform laws. 15 Richardson, Messages and Papers of the Presidents 6942. On the initiative of the Governor of Pennsylvania, a National Congress on Uniform Divorce Laws, in which forty-two States were represented, was called in 1906. This Congress resolved that a constitutional amendment was not feasible and drafted resolutions concerning uniform State legislation. Lichtenberger, *supra*, 191–96. See also Proceedings, National Congress on Uniform Divorce Laws (1906) *passim*; Proceedings 2d Meeting of the Governors of the States of the Union (1910) pp. 185–98. It is interesting to note that even these proponents of uniformity advocated that each State "adopt a statute embodying the principle contained in" the very Massachusetts statute now held unconstitutional by the Court perhaps in the interests of uniformity. Lichtenberger, *supra*, at 194.

The bill prepared by the Congress was also approved by the Commissioners on Uniform State Laws (Proceedings, 17th Ann. Conf., Commissioners on Uniform State Laws (1907) pp. 120 *et seq.*) but was adopted by only three States. See pp. 360–361, *supra*. The Commissioners eventually decided that no uniform law establishing substantive grounds for divorce could succeed, and replaced this proposal with the Uniform Divorce Jurisdiction Act, which would have accorded recognition to a wider range of decrees than were protected by *Haddock* v. *Haddock*, 201 U. S. 562, then in force. [1930] Handbook of the National Conference of Commissioners on Uniform State

confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution. The answer to so tangled a problem as that of our conflicting divorce laws is not to be achieved by the simple judicial resources of either/or—this decree is good and must be respected, that one is bad and may be disregarded. We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court. The only way in which this Court can achieve uniformity, in the absence of Congressional action or constitutional amendment, is by permitting the States with the laxest divorce laws to impose their policies upon all other States. We cannot as judges be ignorant of that which is common knowledge to all men. We cannot close our eyes to the fact that certain States make an industry of their easy divorce laws, and encourage inhabitants of other States to obtain "quickie" divorces which their home States deny them.[14] To permit such States

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Laws, pp. 498–502. This act has been adopted only by Vermont, L. 1931, No. 45, and was repealed two years later. L. 1933, No. 38.

Meanwhile, other organizations have not given up the attempt to have enacted uniform divorce laws, although in recent years the objective has usually been uniformly liberal rather than uniformly repressive legislation. See, *e. g.*, Woman's Home Companion, Dec., 1947, p. 32.

Even in the international field, attempts to avoid conflicts as to the extraterritorial validity of divorces have been made. See, *e. g.*, Convention to Regulate Conflicts of Laws and of Jurisdiction in Matters of Divorce and Separation, The Hague, June 12, 1902.

[14] See the interesting account of Nevada's divorce mill, written by two members of the Nevada Bar, Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law & Contemp. Prob. 302; cf. Bergeson, *The Divorce Mill Advertises*, *id.* at 348.

to bind all others to their decrees would endow with constitutional sanctity a Gresham's Law of domestic relations.

Fortunately, today's decision does not go that far. But its practical result will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it. But if the doctrine of *res judicata* as to jurisdictional facts in controversies involving exclusively private interests as infused into the Full Faith and Credit Clause is applied to divorce decrees so as to foreclose subsequent inquiry into jurisdiction, there is neither logic nor reason nor practical desirability in not taking the entire doctrine over. *Res judicata* forecloses relitigation if there has been an opportunity to litigate once, whether or not it has been availed of, or carried as far as possible. *Cromwell* v. *County of Sac,* 94 U. S. 351; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371.[15] And it applies to questions of jurisdiction of subject matter as well as to that of persons. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66. Why should it not apply where there has been a wasted opportunity to litigate, but should apply where the form of a contest has been gone through?[16] Or if more than form is required, how much of a contest must it be? Must the contest be bellicose or

[15] *Quaere,* whether today's decision applies to *ex parte* Nevada decrees by default, where the defendant later files a general appearance and the record is made to show jurisdiction *nunc pro tunc.* Nev. Comp. Laws (1931–1941 Supp.) § 9488.

[16] It is by no means clear that the issue before the Massachusetts courts in either of these cases was or could have been litigated in Florida or Nevada. All that the Florida or Nevada courts could have determined was whether the jurisdictional requisites of State law and of the due process clause of the Constitution were met. And if a direct attack on these decrees had been made in this Court, all

may it be pacific? Must it be fierce or may it be tepid? Must there be a cloud of witnesses to negative the testimony of the plaintiff, or may a single doubter be enough? Certainly if the considerations that establish *res judicata* as between private litigants in the ordinary situations apply to the validity of a divorce against the public policy of the State of domicile, it cannot make a rational difference that the question of domicile is contested with bad feeling rather than amicably adjusted. The essence of the matter is that through the device of a consent decree a policy of vital concern to States should not be allowed to be defied with the sanction of this Court. If perchance the Court leaves open the right of a State to prove fraud in the ordinary sense—namely, that a mock contest was won by prearrangement—the claim falls that today's decision will substantially restrict the area of uncertainty as to the validity of divorces. If the Court seeks to avoid this result by holding that a party to a feigned legal contest cannot question in his home State the good faith behind an adjudication of domicile in another State, such

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that we could have decided would have been the due process point. A divorce may satisfy due process requirements, and be valid where rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory. Compare *Williams* v. *North Carolina*, 317 U. S. 287, 307 (concurring opinion), with *Williams* v. *North Carolina*, 325 U. S. 226. This is true even though the Florida and Nevada courts appear to characterize the jurisdictional prerequisites under their respective laws as domicile, *Wade* v. *Wade*, 93 Fla. 1004, 1007; *Latterner* v. *Latterner*, 51 Nev. 285; since we may be unwilling to apply as loose a test of "domicile," in determining whether extrastate enforcement is mandatory, as those States might properly choose to use in determining what divorces might be granted and effective within their own borders. Thus, at no point in the proceedings in Florida or Nevada in the instant cases was there an opportunity to litigate whether Mrs. Sherrer or Mr. Coe had acquired Florida or Nevada domicile, respectively, sufficient to entitle their divorces to extraterritorial recognition.

holding is bound to encourage fraud and collusion still further.

In considering whether the importance of the asserted uncertainties of marital status under existing law is sufficient to justify this result, it is important to think quantitatively, not dramatically. One would suppose that the diversity in the divorce laws of the forty-eight States, and the unwillingness of most of them to allow the few which make an industry out of granting divorce to impose their policies upon the others, undermines the structure of the family and renders insecure all marriages of previously divorced persons in the United States. The proportion of divorced people who have cause to worry is small indeed. Those who were divorced at home have no problem. Those whose desire to be rid of a spouse coincided with an unrelated shift of domicile will hardly be suspect where, as is usually true, the State to which they moved did not afford easy divorces or required a long residence period. Actually, there are but five States, Arkansas, Florida, Idaho, Nevada, and Wyoming, in which divorces may be easily obtained on less than one year's residence.[17] Indovina and Dalton, *Statutes of All States and Territories with Annotations on Marriage-Annulment-Divorce* (Santa Monica, 1945). These five States accounted for only 24,370 divorces in 1940, but 9% of the national total. Dept. of Commerce, *Statistical Abstract of the United States* (1946) p. 94. The number of divorces granted in Arkansas, Idaho, and Wyoming is small enough to indicate the normal incidence of divorce among their permanent population, with only few transients taking advantage of their divorce laws. Nevada and Florida thus attract virtually all the non-resident

[17] North Carolina appears to be the only other State allowing divorce on less than a year's residence, but it does not allow divorce for many of the usual causes. The *Williams* cases attest that its laws are not lax.

divorce business. Yet, between them, only 16,375 divorces were granted in 1940, 6% of the total. *Ibid.* Some of these people were undoubtedly permanently settled in those States, and have nothing to fear. Others may have moved to those States, intending to make their permanent homes there, and have since remained. They were amply protected by the Full Faith and Credit Clause even before today's decision. The only persons at all insecure are that small minority who temporarily left their home States for a State—one of the few—offering quick and easy divorce, obtained one, and departed. Is their security so important to the Nation that we must safeguard it even at the price of depriving the great majority of States which do not offer bargain-counter divorces of the right to determine the laws of domestic relations applicable to their citizens?

Even to a believer in the desirability of easier divorce—an issue that is not our concern—this decision should bring little solace. It offers a way out only to that small portion of those unhappily married who are sufficiently wealthy to be able to afford a trip to Nevada or Florida, and a six-week or three-month stay there.[18]

Of course, Massachusetts may not determine the question of domicile in disregard of what her sister States have found. A trial *de novo* of this issue would not satisfy the requirements which we laid down in the second *Williams* case, 325 U. S. at 236. Nor can Massachusetts make find-

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[18] The easier it is made for those who through affluence are able to exercise disproportionately large influence on legislation, to obtain migratory divorces, the less likely it is that the divorce laws of their home States will be liberalized, insofar as that is deemed desirable, so as to affect all. See Groves, *Migratory Divorces*, 2 Law & Contemp. Prob. 293, 298. For comparable instances, in the past, of discrimination against the poor in the actual application of divorce laws, cf. Dickens, Hard Times, c. 11; Hankins, *Divorce*, 5 Encyc. Soc. Sci. 177, 179.

ings on this issue which preclude reexamination by this Court, nor may it, through prejudice in favor of its own policies, strain the facts to find continuance of the tie between the parties and itself. But the records in these cases do not justify the conclusion that Massachusetts has been remiss in its duty of respect. It is true that its courts did not employ a formal legal jargon and say that there was a presumption in favor of the findings of Florida or Nevada and that this presumption had been overcome by the evidence. But the Constitution demands compliance, not a form of words. To ascertain whether in fact there is a real basis for saying that Massachusetts did not accord proper recognition to Nevada's and Florida's findings, we must turn to the records and discover for ourselves just how much warrant there was for their findings of domicile.

The petitioner and respondent in *Sherrer* v. *Sherrer* were married in New Jersey in 1930, and moved to Monterey, Massachusetts, in 1932, where they lived together until 1944. They had two children. There was evidence that their relationship became less than harmonious towards the end of this period, that Mrs. Sherrer was troubled by a sinus infection and had been advised by a physician to go to Florida, and that she consulted a Massachusetts attorney about divorce before leaving. In March, 1944, she told Sherrer that she wished to take a trip to Florida for a month's rest and wanted to take the children along. She later testified that she had intended even then to go to Florida to stay, but had lied in order to obtain her husband's consent. His consent and the necessary funds were forthcoming. On April 3, 1944, Mrs. Sherrer and the children left for Florida, taking along a suitcase and a small bag, but leaving behind a trunk, some housedresses, and much of the children's clothing. They arrived the following day. She rented an apartment in St. Petersburg, which they occupied for about

three weeks, then moved into a furnished cottage and later into another furnished cottage.

About a week after Mrs. Sherrer's departure, one Phelps, who had previously been at least an acquaintance of hers, knowing that she had gone to St. Petersburg, went there, met her soon after, and saw her frequently. On April 20, she wrote to her husband that she did not care to go back to him, and returned the money for train fare which he had sent. She sent her older daughter to school and took a job as a waitress. Phelps found employment in a lumber yard.

Florida law permits institution of proceedings for divorce after ninety days' bona fide residence in the State. On July 6, ninety-three days after her arrival in the State, Mrs. Sherrer consulted a Florida attorney, had the necessary papers drawn up, and filed a libel for divorce the same day. Sherrer, receiving notice by mail, retained Florida counsel, who entered a general appearance and filed an answer, which denied Mrs. Sherrer's allegations as to residence. The case was set for hearing on November 14. On November 9, Sherrer arrived on the scene. He and his wife entered into a stipulation, subject to the approval of the court, providing for custody of the children in him during the school year and in her during summer vacations. At the hearing, Sherrer's attorney was present, and Sherrer remained in a side room. The attorney did not cross-examine Mrs. Sherrer or offer evidence as to either jurisdiction or the merits, other than the stipulation regarding custody of the children. Sherrer was called into the courtroom and questioned as to his ability to look after the children during the school year. The hearing was closed, the decree being held up pending filing of a deposition by Mrs. Sherrer. On November 19, Sherrer returned to Massachusetts with the children. On November 29, the deposition was filed and the decree entered. On December 1, the petitioner mar-

ried Phelps and the couple took up residence in the cottage which she and the children had previously occupied.

There they remained until early in February, 1945, when they returned to Massachusetts, staying for a few days at Westfield and then returning to Monterey. Phelps' father lived in Westfield, and Phelps testified that his father's critical illness occasioned their return. A few days later, Phelps was served with papers in a $15,000 alienation of affections action brought by Sherrer. He testified that the pendency of this action was the reason for his remaining in Massachusetts even after his father's health had become less critical. The trial was set many months ahead, but Phelps and the petitioner did not return to Florida. Rent on the Florida cottage for a month following their departure was paid, but this may have been required, as it was paid on a monthly basis. Some personal belongings were left behind there. Later, the landlord was informed that Phelps and the petitioner would not continue renting the cottage, and still later they asked that their belongings be sent to Monterey.

Sherrer had meanwhile moved out of the house which he and the petitioner had formerly lived in, which they owned together. Phelps and the petitioner moved in, and did not return to Florida. On June 28, 1945, a petition was filed by Sherrer in the Berkshire County Probate Court for a decree setting forth that his wife had deserted him and that he was living apart from her for justifiable cause. A statute provided that such a decree would empower a husband to convey realty free of dower rights. Mass. Gen. Laws c. 209, § 36 (1932). The Probate Court found that Mrs. Sherrer had not gone to Florida to make it her permanent home but with the intention of meeting Phelps, divorcing Sherrer, marrying Phelps, and returning to Massachusetts. These findings were upheld by the Supreme Judicial Court of the State.

The parties in *Coe* v. *Coe* were married in 1934 in New York City. Until 1939, they spent a large part of each year in travel, but had only one home, owned by Coe, in Worcester, Massachusetts. Coe also owned other land, maintained bank accounts, paid taxes, registered his automobile, etc., all in Worcester.

Beginning in 1940, Coe also maintained an apartment in New York City, where much of his business was conducted. He usually lived there during the week, returning to Worcester on week ends. In New York City there also lived one Dawn Allen, his secretary and friend. His relations with Mrs. Coe deteriorated. It appears that during this period as well, his principal domicile was in Worcester. His own testimony as to where he intended to make his home at this time was contradictory. He kept bank accounts and most of his funds in New York and did jury duty there. He used his Worcester address in correspondence and when incorporating a personal corporation.[19] The trial judge found that his domicile remained in Worcester.

In January, 1942, Mrs. Coe filed a petition for separate support in the Worcester County Probate Court. Coe cross-petitioned for divorce. On March 25, Coe's petition was dismissed, and Mrs. Coe's granted; she was awarded $35 per week. She appealed, complaining of the amount. While the appeal was pending, Coe left Worcester for New York, and accompanied by Dawn Allen and her mother, left New York on May 31, for Reno, Nevada, arriving there on June 10. He lived at the Del Monte Ranch. He testified that he went there to relieve his asthma and because of Nevada's liberal tax laws. He also gave conflicting testimony as to whether

[19] For purposes of State taxation, he might well have been regarded as domiciled in either State. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398.

he went there in order to get a divorce. On June 11, he consulted a lawyer for whom his Worcester attorney had prepared a divorce memorandum. He opened a bank account and rented a safe-deposit box, registered his automobile and took out a driver's license, all in Nevada. He did not sever his other ties with New York or Massachusetts.

Nevada law permits institution of proceedings for divorce after six weeks' residence. Forty-seven days after his arrival in the State, Coe filed a complaint for divorce, alleging six weeks' bona fide residence. Notice was mailed to Mrs. Coe, who followed to Reno, engaged an attorney, and demurred to the complaint. Subsequently, however, she and Coe entered into a written agreement, providing for a lump sum payment to Mrs. Coe of $7,500, and $35 per week. On September 19, she filed an answer in which she admitted Coe's residence as alleged in his complaint, and a cross-complaint. On the same day, a divorce was granted to Mrs. Coe, and the court adopted the agreement. Also on the same day, Coe married Dawn Allen. Two days later they left Reno, returned to New York, where Coe gave up his apartment, and returned to Worcester on October 1, residing at a house owned by him there.

On February 25, 1943, the Supreme Judicial Court of Massachusetts affirmed the separate maintenance decree of the Worcester County Probate Court. Coe made no payments to the respondent under either that decree or that of the Nevada court, other than the $7,500 lump sum. On May 22, 1943, respondent filed a petition in the Probate Court to have him cited for contempt. Coe petitioned to have the decree revoked because of the supervening Nevada divorce decree.

While this was pending, Coe and Dawn spent a part of the summer of 1943 at the Del Monte Ranch, near

Reno, to confer with Coe's Nevada divorce lawyer and to negotiate for the purchase of the Ranch. Apparently, the purchase was not made. With the exception of this period, he and Dawn have resided at Worcester continuously since their marriage. Coe kept his bank accounts and post-office box there, and paid his poll tax and other local taxes. In February, 1944, he purchased a more expensive house, into which they moved. In various formal papers, he noted Worcester as his residence.

On October 21, 1943, the Probate Court, on the basis of the Nevada divorce, revoked its separate maintenance decree. The respondent's proffer of evidence to show lack of jurisdiction in the Nevada court was rejected. This ruling was reversed by the Supreme Judicial Court, which sent the case back to allow evidence contradicting the Nevada finding of domicile. On remand, such evidence was taken, the gist of which has been summarized. The Probate Court found that the parties had been domiciled in Massachusetts throughout, and that Coe's trip to Nevada was made in order to obtain a divorce and not to change his domicile. These findings were upheld by the Supreme Judicial Court.

Conceding that matters of credibility were for the triers of fact, the evidence appears to me to have been ample to justify the findings that were made, even giving every weight to the contrary Nevada and Florida determinations and treating the burden on the party contradicting those determinations as most heavy. Judges, as well as jurors, naturally enough may differ as to the meaning of testimony and the weight to be given evidence. I would not deem it profitable to dissent on such an issue touching the unique circumstances of a particular case. My disagreement with the decision of the Court is not as to the weight of the evidence, but concerns what I take to be its holding, that the opportunity of the parties to litigate

the question of jurisdiction in Nevada and Florida foreclosed Massachusetts from raising the question later. If the Court had merely held that the evidence was not sufficient to justify Massachusetts' findings, contrary to what was recited in the decrees of Nevada and Florida, or, as an added assurance that obligations of recognition be honored, had required of the Massachusetts court explicit avowal of the presumption in favor of the Florida and Nevada decrees, I should have remained silent. But the crux of today's decision is that regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy has been gone through. To such a proposition I cannot assent. Decisions of this Court that have not stood the test of time have been due not to want of foresight by the prescient Framers of the Constitution, but to misconceptions regarding its requirements. I cannot bring myself to believe that the Full Faith and Credit Clause gave to the few States which offer bargain-counter divorces constitutional power to control the social policy governing domestic relations of the many States which do not.

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COE *v.* COE.

CERTIORARI TO THE PROBATE COURT FOR WORCESTER COUNTY, MASSACHUSETTS.

No. 37. Argued October 14, 1947.—Decided June 7, 1948.

In a suit between residents of the state, a Massachusetts court granted a wife separate support and denied her husband a divorce. The husband went to Nevada and sued for divorce there as soon as he had been there the six weeks required by Nevada law. The wife appeared personally and by counsel, filed a cross-complaint for divorce, admitted the husband's Nevada residence, and participated personally in the proceedings. After full opportunity to try the jurisdictional issues, the Nevada court found that it had jurisdiction and granted the wife a divorce, which was valid and final under Nevada law. The husband then married again and returned to Massachusetts, whereupon his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under its earlier decree. She also moved that the support decree be modified so as to award her a larger allowance. The husband defended on the ground of the Nevada divorce. The Massachusetts court held the Nevada divorce void for want of jurisdiction and increased the first wife's allowance for separate support. Its opinion contained no intimation that, under state law, the decree for separate support would survive if the Nevada divorce were valid. *Held:* By subjecting the Nevada decree to collateral attack, the Massachusetts court denied it full faith and credit contrary to Art. IV, § 1 of the Constitution and the Act of May 26, 1790, 28 U. S. C. § 687. See *Sherrer* v. *Sherrer*, *ante*, p. 343. Pp. 379–384.

320 Mass. 295, 69 N. E. 2d 793, reversed.

A Massachusetts probate court denied a divorce to a resident of that state and granted separate support to his wife. The Supreme Judicial Court of Massachusetts affirmed. 313 Mass. 232, 46 N. E. 2d 1017. He went to Nevada and sued for a divorce. His wife appeared personally and filed a cross-complaint. The Nevada court found that it had jurisdiction and granted the wife a divorce. Upon the husband's return to Massachusetts,

the wife petitioned the probate court there to adjudge him in contempt for failure to make payments for her support under its earlier decree. She also moved for an increase in her allowance under the support decree. Upon proof of the Nevada divorce, the probate court dismissed the petition. The Supreme Judicial Court of Massachusetts reversed. 316 Mass. 423, 55 N. E. 2d 702. After hearings on the issue of domicile, the probate court held the Nevada divorce void for want of jurisdiction and increased the wife's allowance for support. The Supreme Judicial Court of Massachusetts affirmed. 320 Mass. 295, 69 N. E. 2d 793. This Court granted certiorari. 330 U. S. 814. *Reversed,* p. 384.

Samuel Perman argued the cause for petitioner. With him on the brief was *George H. Mason.*

Francis M. Shea argued the cause for respondent. With him on the brief was *Warner W. Gardner.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This is the companion case to *Sherrer* v. *Sherrer, ante,* p. 343. We granted certiorari to consider the contention of petitioner that the courts of Massachusetts have failed to accord full faith and credit to a decree of divorce rendered by a court of the State of Nevada.

Petitioner, Martin V. B. Coe, and the respondent, Katherine C. Coe, were married in New York in 1934, and thereafter resided as husband and wife in Worcester, Massachusetts.[1] Discord developed between the parties, and on January 13, 1942, respondent filed a petition for separate support in the Probate Court for the County of Worcester. Petitioner answered and filed a libel for

[1] It appears that after October, 1940, petitioner maintained an apartment in New York City. The Massachusetts courts found that petitioner did not thereby lose his Massachusetts domicile.

divorce. Following a hearing, the petition for separate support was granted and the libel for divorce was dismissed.[2] The decree of the Probate Court was affirmed by the Supreme Judicial Court of Massachusetts on February 23, 1943.[3]

Petitioner left Worcester in May, 1942, and arrived in Reno, Nevada, on June 10, accompanied by his secretary, one Dawn Allen, and her mother. On July 24, 1942, petitioner, through his attorney, instituted divorce proceedings by filing a complaint in the First Judicial District Court of the State of Nevada. The complaint alleged that petitioner was a bona fide resident of the State of Nevada [4] and charged respondent with desertion and extreme cruelty. Respondent received notice of the proceedings while in Massachusetts. She arrived in Nevada in August, 1942, and thereafter, through attorneys, filed an answer to petitioner's complaint together with a cross-complaint for divorce alleging extreme cruelty on the part of petitioner as grounds for her suit. Respondent's answer admitted as true the allegations of petitioner's complaint relating to petitioner's Nevada residence.

At the hearing in the divorce proceedings, petitioner and respondent appeared personally. Both parties were represented by counsel. Petitioner testified that he had come to Nevada with the intention of making that State

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[2] By the terms of the decree of separate support entered on March 25, 1942, petitioner was ordered to pay to respondent the sum of $35 each week.

[3] 313 Mass. 232, 46 N. E. 2d 1017 (1943).

[4] The first allegation of petitioner's complaint stated: "That plaintiff for more than six weeks last past and immediately preceding the filing of this complaint has been continuously and now is, a bona fide resident of, and during all of said period of time, has had and now has his residence within the State of Nevada, and has been physically, corporally and actually present in said State during all of the aforesaid period of time."

his home and that such was his present intention. Respondent gave testimony with respect to specific acts of cruelty, but raised no question in relation to petitioner's domicile. On September 19, 1942, the Nevada court, after finding that it had "jurisdiction of the plaintiff and defendant and of the subject matter involved," [5] entered a decree granting respondent a divorce as prayed for in her cross-complaint.[6] Neither party challenged the decree by appeal to the Nevada Supreme Court.[7]

Following the entry of the divorce decree, petitioner and Dawn Allen were married in Nevada. Shortly thereafter, they returned to Worcester, Massachusetts, as husband and wife. In May or June, 1943, they left Massachusetts for Nevada where they remained until August of that year.

On May 22, 1943, respondent filed a petition in the Probate Court for the County of Worcester, praying that petitioner be adjudged in contempt of court for failing to abide by the terms of the decree for separate support which had been entered by the Massachusetts court in the previous year.[8] Subsequently, respondent also moved that the decree for separate support be modified so as

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[5] The Nevada courts recognize domicile of one of the parties as a prerequisite to divorce jurisdiction, *Latterner* v. *Latterner,* 51 Nev. 285, 274 P. 194 (1929). Power to decree divorces in appropriate cases is conferred upon the District Courts by Nevada statute. Nev. Comp. Laws, § 9460.

[6] Incorporated into the decree was a written agreement whereby petitioner was to pay respondent the sum of $7,500 plus $35 per week so long as she should remain single. Pursuant to this agreement, petitioner paid the sum of $7,500 at the time the decree was entered.

[7] Appeals lie to the Nevada Supreme Court in divorce cases. See, *e. g., Afriat* v. *Afriat,* 61 Nev. 321, 117 P. 2d 83 (1941).

[8] Apparently upon advice of counsel, petitioner had failed to pay any of the weekly installments required under the decree for separate support or under the agreement incorporated into the divorce decree after the date of the divorce decree.

to award her a larger allowance. Petitioner in his answer denied that the decree for separate support was still in effect and set up the Nevada divorce decree as a bar to respondent's action.

In the hearings which followed, petitioner introduced in evidence an exemplified copy of the Nevada court proceeding. The presiding judge refused to allow the introduction of evidence placing in issue petitioner's Nevada domicile and thereby the jurisdiction of the Nevada court, on the ground that permitting such collateral attack was not consistent with the requirements of full faith and credit. Petitioner's motion to dismiss the action was, accordingly, allowed.

The Supreme Judicial Court of Massachusetts reversed on appeal, holding that the Probate Court had erred in excluding the evidence placing in issue petitioner's Nevada domicile and the jurisdiction of the Nevada court.[9] In conformity with that judgment, the Probate Court held an extended hearing on those questions.[10] The court concluded that petitioner went to Nevada to seek a divorce; that neither petitioner nor respondent had a bona fide residence in that State; that the Nevada court did not have jurisdiction of either party; and that the divorce was in violation of the provisions of the appli-

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[9] 316 Mass. 423, 55 N. E. 2d 702 (1944).

[10] Petitioner testified that since his arrival in Nevada in June, 1942, he had been domiciled in that State. He stated that he went to Nevada to help his asthma and to take advantage of the liberal tax laws and that he intended to reside in Nevada whether or not he obtained a divorce. He testified further that following his marriage with Dawn Allen, he went to Worcester, Massachusetts, for the purpose of disposing of two houses which he owned. He subsequently returned to Nevada in May, 1943. Petitioner stated that shortly after his return to Nevada, he learned that respondent had instituted contempt proceedings in the Massachusetts Probate Court and upon advice of counsel went to Massachusetts in August, 1943, to defend the action.

cable Massachusetts statute.[11] The Probate Court dismissed petitioner's motion for revocation of the decree for separate support and modified that decree so as to award respondent a substantially larger allowance. On appeal, the Supreme Judicial Court affirmed the order of the Probate Court dismissing petitioner's motion to revoke the decree for separate support, on the ground that the evidence supported the conclusion that petitioner was never domiciled in Nevada and that the Nevada courts lacked jurisdiction to enter the decree of divorce. The order of the Probate Court modifying the decree for separate support was reversed, apparently for further hearings on petitioner's financial condition.[12] There is no suggestion in the opinion of the Supreme Judicial Court that petitioner, under state law, could be held to the obligations imposed by the decree for separate support if it be conceded that the Nevada decree of divorce is valid.[13]

It is clear that the decree of divorce in question is valid and final in the State in which it was rendered and, under the law of Nevada, may not be subjected to the collateral attack permitted in this case in the Massachusetts courts.[14] Respondent does not urge the contrary.

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[11] Mass. Gen. Laws (Ter. ed.), c. 208, § 39, provides: "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

[12] 320 Mass. 295, 69 N. E. 2d 793 (1946).

[13] See *Rosa* v. *Rosa*, 296 Mass. 271, 5 N. E. 2d 417 (1936); *Cohen* v. *Cohen*, 319 Mass. 31, 64 N. E. 2d 689 (1946). Cf. *Estin* v. *Estin*, *post*, p. 541; *Kreiger* v. *Kreiger*, *post*, p. 555.

[14] *Confer* v. *District Court*, 49 Nev. 18, 234 P. 688, 236 P. 1097 (1925). And see *Chamblin* v. *Chamblin*, 55 Nev. 146, 27 P. 2d 1061 (1934); *Calvert* v. *Calvert*, 61 Nev. 168, 122 P. 2d 426 (1942).

Nor has it been suggested that the proceedings before the Nevada court were in any degree violative of the requirements of procedural due process or that respondent was denied a full opportunity to contest the issue of petitioner's Nevada domicile.

It is abundantly clear that respondent participated in the Nevada divorce proceedings. She appeared personally and gave testimony at the hearing. Through her attorneys she filed pleadings in answer to petitioner's complaint and successfully invoked the jurisdiction of the Nevada court to obtain the decree of divorce which she subsequently subjected to attack as invalid in the Massachusetts courts.

Thus, here, as in the *Sherrer* case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues. It is a decree not susceptible to collateral attack in the courts of the State in which it was rendered. In the *Sherrer* case, we concluded that the requirements of full faith and credit preclude the courts of a sister State from subjecting such a decree to collateral attack by readjudicating the existence of jurisdictional facts. That principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered. For reasons stated at length in the *Sherrer* case, we hold that the Massachusetts courts erred in permitting the Nevada divorce decree to be subjected to attack on the ground that petitioner was not domiciled in Nevada at the time the decree was entered.

Reversed.

[For dissenting opinion of FRANKFURTER, J., concurred in by MURPHY, J., see *ante*, p. 356.]

TOOMER ET AL. *v.* WITSELL ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 415. Argued January 13–14, 1948.—Decided June 7, 1948.

Fishermen who were citizens and residents of Georgia, and an incorporated fish dealers' association, sued in a federal court in South Carolina to enjoin state officials from enforcing statutes of that State regulating commercial shrimp fishing in the three-mile maritime belt off the coast, challenging the statutes as violative of the Federal Constitution. *Held:*

1. Since the record does not show that enforcement of the statutes would irreparably injure the association of fish dealers, the association has no standing to ask a federal court to enjoin their enforcement. P. 391.

2. Since the state law permits any taxpayer who believes a tax illegal to pay it under protest and sue in a state court to recover the amount so paid, and since the individual plaintiffs made no showing that they could not utilize that procedure to raise their constitutional objections to a statute imposing upon non-residents an income tax on profits from operations in the state, it cannot be said that they are without an adequate remedy at law; and equitable relief was properly denied as to that statute. Pp. 391–392.

3. Since defiance of other statutes defendants were attempting to enforce would involve risks of heavy fines and long imprisonment, and since compliance with them or withdrawal from further fishing until a test case could be litigated to a final conclusion would result in substantial financial losses for which no compensation could be obtained under the laws of the state, the individual plaintiffs sufficiently showed the imminence of irreparable injury for which there was no plain, adequate and complete remedy at law; and, if those statutes were unconstitutional, equitable relief against their enforcement was appropriate. Pp. 391–392.

4. Since the fact that some of the individual plaintiffs had previously been convicted of shrimping out of season and in inland waters had no relation to the constitutionality of the challenged statutes, this misconduct did not call for application of the clean hands maxim. P. 393.

5. Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery—within the confines of generally applicable constitutional limitations. Pp. 393–394.

6. Section 3374, S. C. Code, which imposes a tax of $\frac{1}{8}¢$ a pound on green shrimp taken in the maritime belt, does not tax imports or unduly burden interstate commerce in violation of Art. I, §§ 8 and 10, of the Constitution. Pp. 394–395.

7. Section 3379, S. C. Code, requiring non-residents of South Carolina to pay a license fee of $2,500 for each shrimp boat and residents to pay a fee of only $25, violates the privileges and immunities clause of Art. IV, § 2, of the Constitution. Pp. 395–403.

(a) The privileges and immunities clause was intended to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed; and in this case there is no convincing showing of a reasonable relationship between the alleged danger to the shrimp supply represented by non-citizens, as a class, and the severe discrimination practiced upon them. Pp. 396–399.

(b) Commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause. *McCready* v. *Virginia*, 94 U. S. 391, distinguished. Pp. 399–403.

8. Section 3414, S. C. Code, which requires that owners of shrimp boats fishing in the maritime belt off South Carolina dock at a South Carolina port and unload, pack, and stamp their catch (with a tax stamp) before "shipping or transporting it to another state," burdens interstate commerce in shrimp in violation of the commerce clause of Art. I, § 8, of the Constitution. *Geer* v. *Connecticut*, 161 U. S. 519, distinguished. Pp. 403–407.

73 F. Supp. 371, affirmed in part and reversed in part.

A federal district court denied an injunction against the enforcement of certain allegedly unconstitutional South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. 73 F. Supp. 371. On direct appeal to this Court, *affirmed in part and reversed in part*, p. 407.

Aaron Kravitch and *Robert E. Falligant* argued the cause for appellants. With them on the brief were *Phyllis Kravitch* and *John J. Bouhan.*

J. Monroe Fulmer, Assistant Attorney General of South Carolina, and *David W. Robinson* argued the cause for appellees. With them on the brief were *John M. Daniel,* Attorney General, *T. C. Callison,* Assistant Attorney General, and *James F. Dreher.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This is a suit to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. Appellants, who initiated the action, are five individual fishermen, all citizens and residents of Georgia, and a non-profit fish dealers' organization incorporated in Florida. Appellees are South Carolina officials charged with enforcement of the statutes.

The three-judge Federal District Court which was convened to hear the case [1] upheld the statutes, denied an injunction and dismissed the suit.[2] On direct appeal from that judgment [3] we noted probable jurisdiction.

The fishery which South Carolina attempts to regulate by the statutes in question is part of a larger shrimp fishery extending from North Carolina to Florida.[4] Most of

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[1] The court was convened pursuant to § 266 of the Judicial Code, 28 U. S. C. § 380.

[2] 73 F. Supp. 371 (1947).

[3] The appeal is authorized by § 266 of the Judicial Code, 28 U. S. C. § 380.

[4] See Johnson and Lindner, *Shrimp Industry of the South Atlantic and Gulf States* (U. S. Dept. of Commerce, Bureau of Fisheries Investigational Rep. No. 21, 1934); Annual Rep. of S. C. State Board of Fisheries (1946).

the shrimp in this area are of a migratory type, swimming south in the late summer and fall and returning northward in the spring. Since there is no federal regulation of the fishery, the four States most intimately concerned have gone their separate ways in devising conservation and other regulatory measures. While action by the States has followed somewhat parallel lines, efforts to secure uniformity throughout the fishery have by and large been fruitless.[5] Because of the integral nature of the fishery, many commercial shrimpers, including the appellants, would like to start trawling off the Carolinas in the summer and then follow the shrimp down the coast to Florida. Each State has been desirous of securing for its residents the opportunity to shrimp in this way, but some have apparently been more concerned with channeling to their own residents the business derived from local waters. Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States.[6]

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[5] At least three of the States (Florida, Georgia, and South Carolina) belong to the Atlantic States Marine Fisheries Commission, one of the principal aims of which is to secure the enactment of uniform fisheries laws. The Commission was established pursuant to an interstate compact which has been ratified by at least thirteen eastern States. Its duties, however, are largely consultive and advisory, and to date its efforts have produced little in the way of concrete results insofar as the South Atlantic shrimp fishery is concerned. See 56 Stat. 267 (1942); Fla. Stat. Ann. § 374.43 (Supp. 1946); Ga. Code Ann. § 45–1001 *et seq.* (Supp. 1947); S. C. Code Ann. (1944 Supp.) § 1776–1; Annual Rep. of the S. C. State Board of Fisheries (1943); *id.* (1944); *id.* (1945); *id.* (1946).

[6] See Fla. Stat. Ann. § 374.14 (3) (Supp. 1946), as amended by 1947 Gen. Laws of Fla., Act 163; Ga. Code Ann. §§ 45–216, 45–217 (1937); N. C. Gen. Stat. Ann. § 113–238, as amended 1947 Session

South Carolina forbids trawling for shrimp in the State's inland waters,[7] which are the habitat of the young shrimp for the first few months of their life. It also provides for a closed season in the three-mile maritime belt during the spawning season, from March 1 to July 1.[8] The validity of these regulations is not questioned.

The statutes appellants challenge relate to shrimping during the open season in the three-mile belt: Section 3300 of the South Carolina Code provides that the waters in that area shall be "a common for the people of the State for the taking of fish."[9] Section 3374 imposes a tax of ⅛¢ a pound on green, or raw, shrimp taken in those waters.[10] Section 3379, as amended in 1947, requires payment of a license fee of $25 for each shrimp boat owned by a resident, and of $2,500 for each one owned by a non-resident.[11] Another statute, not integrated in

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Laws of N. C., c. 256; S. C. Acts of 1947, Act 281, §§ 1, 2, 5. See also statements by the S. C. State Planning Board that "In revising these [shrimp] laws . . . non-resident licenses [should be] placed on a par or reciprocal basis with those of other states in the South Atlantic group" and "Under existing regulations our fishermen are discriminated against." S. C. State Planning Board Bull. No. 14, p. 59 (1944).

[7] S. C. Code Ann. § 3410 (Supp. 1944).

[8] S. C. Code Ann. § 3408.

[9] "The waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water mark on the coast thereof, not heretofore conveyed by grant from the Legislature or lawful compact with the State, shall continue and remain as a common for the people of the State for the taking of fish . . . ."

[10] "The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit . . . on each pound of green shrimp, one-eighth of one cent. . . ."

[11] Prior to 1947 there was imposed on resident and non-resident shrimpers alike a boat tax of $1.50 per ton; a personal license tax of $5; and a tax of $5 for each shrimp trawl net. S. C. Code Ann. §§ 3375, 3376, 3379. These taxes, with the possible exception of

the Code, conditions the issuance of non-resident licenses for 1948 and the years thereafter on submission of proof that the applicants have paid South Carolina income taxes on all profits from operations in that State during the preceding year.[12] And § 3414 requires that all boats

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§ 3375 imposing a boat tax graduated by tonnage, apparently remain in effect and, in addition, § 3379 was amended as follows:

". . . All owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years, shall take out a license for each boat owned by him and said license shall be Two thousand five hundred ($2,500.00) dollars per year." S. C. Acts of 1947, Act 281, § 1.

The appellants cannot qualify for $150 licenses and hence are subject to the $2,500 provision. As introduced in the legislature and passed by the South Carolina House of Representatives, the bill to amend § 3379 did not contain the $150 provision. That provision was inserted by amendment in the Senate at the instance of a senator from Beaufort County, which is the coastal county adjoining Georgia. See House Bill 555; Senate Bill 576; Senate Journal No. 69, May 9, 1947, pp. 53–5; Charleston News and Courier, May 17, 1947, p. 1, cols. 2–3.

Other parts of the same 1947 statute, not attacked in this case, limit to 100 the number of non-resident boats which may be licensed and forbid altogether the issuance of licenses, even on payment of the $2,500 fee, to residents of States which do not grant licenses to fish in their waters to South Carolina residents at the same or a lower fee. *Id.* §§ 2, 5.

[12] "The Board of Fisheries, before issuing any non-resident licenses in the year 1948 and thereafter, shall require proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year." *Id.* § 3.

licensed to trawl for shrimp in the State's waters dock at a South Carolina port and unload, pack, and stamp their catch "before shipping or transporting it to another State or the waters thereof." [13] Violation of the fishing laws entails suspension of the violator's license as well as a maximum of a $1,000 fine, imprisonment for a year, or a combination of a $500 fine and a year's imprisonment.[14]

First. We are confronted at the outset with appellees' contention, rejected by the District Court, that injunctive relief is inappropriate in this case, regardless of the validity of the challenged statutes, since appellants failed to show the imminence of irreparable injury and did not come into court with clean hands.

As to the corporate appellant, we agree with the appellees that there has been no showing that enforcement of the statutes would work an irreparable injury. The record shows only that the corporation is an association of fish dealers and that it operates no fishing boats. Indeed, neither the record nor the appellants' brief sheds any light on how the statutes affect the corporation, let alone how their enforcement will cause it irreparable injury. Under such circumstances, the corporation has no standing to ask a federal court to take the extraordinary step of restraining enforcement of the state statutes. The remainder of this opinion will therefore be addressed to the individual appellants' case.

As to them, it is agreed that the appellees were attempting to enforce the statutes. It is also clear that compliance with any but the income tax statute would have

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[13] "All boats licensed by this State to trawl for shrimp in the waters of the State of South Carolina shall land or dock at some point in South Carolina, and shall unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another State or the waters thereof. . . ." The stamping refers to tax stamps.

[14] S. C. Acts of 1947, Act 281, § 4; S. C. Code Ann. §§ 3407, 3414.

required payment of large sums of money for which South Carolina provides no means of recovery, that defiance would have carried with it the risk of heavy fines and long imprisonment, and that withdrawal from further fishing until a test case had been taken through the South Carolina courts and perhaps to this Court would have resulted in a substantial loss of business for which no compensation could be obtained. Except as to the income tax statute, we conclude that appellants sufficiently showed the imminence of irreparable injury for which there was no plain, adequate and complete remedy at law.[15]

Appellants' position on the income tax statute [16] is that it is unconstitutional for South Carolina to require Georgia residents to pay South Carolina income taxes on profits made from operations in South Carolina waters. Another South Carolina statute, however, permits any taxpayer who believes a tax to be "illegal for any cause" to pay the tax under protest and then sue in a state court to recover the amounts so paid.[17] In the absence of any showing by appellants that they could not take advantage of this procedure to raise their constitutional objections to the tax, we cannot say that they do not have an adequate remedy at law.

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[15] Appellees stress *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946). We think the doctrine of that case applicable to one of the arguments made against § 3374, *supra* note 10. See the third division of this opinion, *infra* p. 394. As to all the other statutes except that relating to state income taxes, however, we agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts.

[16] See note 12 *supra*.

[17] S. C. Code Ann. § 2469. This section provides that a taxpayer may institute suit to recover the amounts paid within thirty days of the payment under protest. See *Argent Lumber Co.* v. *Query*, 178 S. C. 1, 5, 182 S. E. 93, 94 (1935).

Some of the individual appellants had previously been convicted of shrimping out of season and in inland waters. The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree.

Second. The appellants too press a contention which, if correct, would dispose of the case. They urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States* v. *California,* 332 U. S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida,* 313 U. S. 69, 75 (1941), that "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the [state] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State.*" [18]

Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery.[19]

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[18] 332 U. S. 19, 38 (1947).

[19] Appellants also contend that until 1924 South Carolina had itself limited its boundaries by the low-water mark and had asserted no power over the maritime belt. But, as the District Court held, the statute cited by appellants need not be given the effect which they would attribute to it, and even if it were so construed, it did not impose a constitutional limit on the power of future legislatures.

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It does not follow from the existence of power to regulate, however, that such power need not be exercised within the confines of generally applicable Constitutional limitations. In the view we take, the heart of this case is whether South Carolina's admitted power has been so exercised. We now proceed to various aspects of that problem.

Third. Appellants contend that § 3374,[20] which imposes a tax of ⅛¢ a pound on green shrimp taken in the maritime belt, taxes imports and unduly burdens interstate commerce in violation of §§ 8 and 10 of Art. I of the Constitution. We agree with the court below that there is no merit in this position.

Since South Carolina has power to regulate fishing in the three-mile belt, at least where the federal government has made no conflicting assertion of power, fish caught in that belt cannot be considered "imports" in a realistic sense of the word. Appellants urge, however, that the tax is imposed on shrimp caught outside, as well as within, the three-mile limit. On its face the statute has no such effect, and appellants call our attention to no South Carolina decision so interpreting it. Since we do not have the benefit of interpretation by the State courts and since this suit for an injunction does not present a concrete factual situation involving the application of the statute to shrimping beyond the imaginary three-mile line, it is inappropriate for us to rule in the abstract on the extent of the State's power to tax in this regard.[21]

Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp,

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[20] See note 10 *supra.*

[21] See *American Federation of Labor* v. *Watson,* 327 U. S. 582 (1946); cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

occurs before the shrimp can be said to have entered the flow of interstate commerce.[22]

Fourth. Appellants' most vigorous attack is directed at § 3379[23] which, as amended in 1947, requires non-residents of South Carolina to pay license fees one hundred times as great as those which residents must pay. The purpose and effect of this statute, they contend, is not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents. As such, the statute is said to violate the privileges and immunities clause of Art. IV, § 2, of the Constitution and the equal protection clause of the Fourteenth Amendment.

Article IV, § 2, so far as relevant, reads as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.[24] For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.[25]

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[22] See *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284 (1927); *Lacoste* v. *Dept. of Conservation,* 263 U. S. 545 (1924); *Oliver Iron Co.* v. *Lord,* 262 U. S. 172 (1923); *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245 (1922); *Coe* v. *Errol,* 116 U. S. 517 (1886).

[23] See note 11 *supra.*

[24] See *Paul* v. *Virginia,* 8 Wall. 168, 180–81 (1868); *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 78 (1920).

[25] *Travis* v. *Yale & Towne Mfg. Co., supra* note 24, at 82.

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul* v. *Virginia,* 8 Wall. 168, 180 (1868).

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.[26]

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.[27] The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

With these factors in mind, we turn to a consideration of the constitutionality of § 3379.

By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its

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[26] *Ward* v. *Maryland,* 12 Wall. 418 (1870); see also *Chalker* v. *Birmingham & N. W. R. Co.,* 249 U. S. 522 (1919); *Shaffer* v. *Carter,* 252 U. S. 37, 52–53 (1920).

[27] See *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 79 (1920).

practical effect is virtually exclusionary.[28] This the appellees do not seriously dispute. Nor do they argue that since the statute is couched in terms of residence it is outside the scope of the privileges and immunities clause, which speaks of citizens. Such an argument, we agree, would be without force in this case.[29]

As justification for the statute, appellees urge that the State's obvious purpose was to conserve its shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements.[30] But in any event,

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[28] The parties stipulated that in 1946, the year before non-residents had to pay higher fees than residents, 100 non-resident boats were licensed and that in 1947 only 15 such boats were licensed. Even those 15 were presumably owned by persons who had fished in South Carolina waters the three preceding years and were thus eligible for $150 licenses, since the appellees conceded on oral argument here that no $2,500 licenses had been taken out. See note 11 *supra*.

[29] See *Blake* v. *McClung*, 172 U. S. 239, 247 (1898); *Chalker* v. *Birmingham & N. W. R. Co.*, 249 U. S. 522 (1919); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79 (1920).

[30] It is relevant to note that the statute imposes no limitation on the number of resident boats which may be licensed, and it was stipulated that while the number of non-resident boats fell from 100 to 15 between 1946 and 1947, the total number of boats licensed increased during that time from 254 to 271.

The reports of the State Board of Fisheries for several years back, while expressing solicitude as to the need for conservation measures, reveal equal concern with methods for increasing the market for shrimp—by advertising, air shipments, etc.—and contain frequent references to the economic importance of the shrimp industry to the State. The 1945 report, for example, said that "The shrimp business in our State is quite an industry, it employs numbers of men and boat crews spend large sums of money on repairs, gasoline, oil and food besides the money that is spent by the individuals personally." In connection with the possibility of air shipments to large consuming centers such as New York, the same report said that air transportation "should increase the consumption of same [i. e., seafoods] in

appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. One statement in the appellees' brief might also be construed to mean that the State's conservation program for shrimp requires expenditure of funds beyond those collected in license fees—funds to which residents and not non-residents contribute. Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its

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large quantities; it will also create a much greater demand for shrimp and seafoods all over the universe, and it will place them in sections where they are very seldom consumed with the result that many more people will get sold on the idea of eating same." And the 1946 report's section on shrimp concluded with the statement that "To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year."

fisheries,[31] to graduate license fees according to the size of the boats,[32] or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.

Thus, § 3379 must be held unconstitutional unless commercial shrimp fishing in the maritime belt falls within some unexpressed exception to the privileges and immunities clause.

Appellees strenuously urge that there is such an exception. Their argument runs as follows: Ever since Roman times, animals *ferae naturae,* not having been reduced to individual possession and ownership, have been considered as *res nullius* or part of the "negative community of interests" and hence subject to control by the sovereign or other governmental authority. More recently this thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this "ownership" for the benefit of its citizens. In the case of fish, it has also been considered that each government "owned" both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must

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[31] See Fla. Stat. Ann. § 374.14 (5) (Supp. 1946); 1947 Gen. Laws of Fla., Act 654; Ga. Code Ann. § 45–109 (1937); Johnson and Lindner, *Shrimp Industry of the South Atlantic and Gulf States* (U. S. Dept. of Commerce, Bureau of Fisheries Investigational Rep. No. 21, 1934) 62–63.

[32] South Carolina has itself imposed such a graduated tax in years past. S. C. Code Ann. § 3375 (1942). See also Ga. Code Ann. § 45–210 (1937); N. C. Gen. Stat. Ann. § 113–165 (Supp. 1945).

also "own" the fish within those waters. Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest. Finally, it is said that this special property interest, which nations and similar governmental bodies have traditionally had, in this country vested in the colonial governments and passed to the individual States.

Language frequently repeated by this Court appears to lend some support to this analysis.[33] But in only one case, *McCready* v. *Virginia,* 94 U. S. 391 (1876), has the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination.[34] In that case the Court sanctioned a Virginia statute applied so as to pro-

[33] The most extended exposition appears in the majority opinion in *Geer* v. *Connecticut,* 161 U. S. 519 (1896).

[34] Appellees rely also upon *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914), and *Haavik* v. *Alaska Packers Assn.,* 263 U. S. 510 (1924). The *Patsone* case involved a 1909 Pennsylvania statute forbidding resident aliens to kill game or to possess firearms useful for that purpose. On the record before it, the Court concluded that it could not say that the Pennsylvania legislature was not warranted in assuming that resident aliens were at that time "the peculiar source of the evil that it desired to prevent." The statute was therefore held not to violate the Fourteenth Amendment. But the theory of the case was that there was a substantial reason for the discrimination beyond the mere fact of alienage. The *Haavik* case involved the validity, under an Act of Congress, of an Alaskan statute imposing on non-residents, but not residents, a $5 fishing license fee. In upholding the statute the Court pointed out that "We are not here concerned with taxation by a State." And in considering the power of Congress to authorize such a tax, it was added that the fee was a reasonable contribution toward the protection which the local government afforded to non-residents.

hibit citizens of other States, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was "a property right, and not a mere privilege or immunity of citizenship." And an analogy was drawn between planting oysters in a river bed and planting corn in state-owned land.

It will be noted that there are at least two factual distinctions between the present case and the *McCready* case. First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the *McCready* case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea.

Thus we have, on the one hand, a single precedent which might be taken as reading an exception into the privileges and immunities clause and, on the other, a case which does not fall directly within that exception. Viewed in this light, the question before us comes down to whether the reasons which evoked the exception call for its extension to a case involving the factual distinctions here presented.

However satisfactorily the ownership theory explains the *McCready* case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920), that "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

Indeed, only fifteen years after the *McCready* decision, a unanimous Court indicated that the rule of that case might not apply to free-swimming fish.[35] The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States* v. *California,* 332 U. S. 19 (1947), as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired "ownership" of the three-mile belt.[36]

The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.[37] And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

These considerations lead us to the conclusion that the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case.

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[35] *Manchester* v. *Massachusetts,* 139 U. S. 240, 265 (1891). In that case appellant, a citizen of Rhode Island, was convicted of violating a Massachusetts statute which regulated fishing in Buzzards Bay. The Court upheld Massachusetts' power to enact the regulation, but pointed out that the statute "makes no discrimination in favor of citizens of Massachusetts and against citizens of other States." *Ibid.*

[36] 332 U. S. 19, 31.

[37] See, *e. g.,* Pound, *An Introduction to the Philosophy of Law,* 197–202. The fiction apparently gained currency partly as a result of confusion between the Roman term *imperium,* or governmental power to regulate, and *dominium,* or ownership. Power over fish and game was, in origin, *imperium. Ibid.*

Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause. And since we have previously concluded that the reasons advanced in support of the statute do not bear a reasonable relationship to the high degree of discrimination practiced upon citizens of other States, it follows that § 3379 violates Art. IV, § 2, of the Constitution.

Appellants maintain that by a parity of reasoning the statute also contravenes the equal protection clause of the Fourteenth Amendment. That may well be true, but we do not pass on this argument since it is unnecessary to disposition of the present case.

Fifth. Appellants contend that § 3414,[38] which requires that owners of shrimp boats fishing in the maritime belt off South Carolina dock at a South Carolina port and unload, pack, and stamp their catch (with a tax stamp) before "shipping or transporting it to another state," burdens interstate commerce in shrimp in violation of Art. I, § 8, of the Constitution.

The record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by appellants and by others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to

[38] See note 13 *supra.*

impose an artificial rigidity on the economic pattern of the industry.

Appellees do not contest the fact that the statute thereby burdens, to some extent at least, interstate commerce in shrimp caught in waters off the South Carolina coast. Again, however, they rely on the fact that the commerce affected is in fish rather than some other commodity. They urge that South Carolina, because of its ownership of the shrimp, could constitutionally prohibit all shipments to other States. It follows, they imply, that the State could impose lesser restrictions, such as those here at issue, on out-of-state shipments.

There is considerable authority, starting with *Geer* v. *Connecticut,* 161 U. S. 519 (1896), to support the contention that a State may confine the consumption of its fish and game wholly within the State's limits. We need not pause to consider whether this power extends to free-swimming fish in the three-mile belt, for even as applied to fish taken in inland waters it has been held that where a State did not exercise its full power, but on the contrary permitted shipments to other States, it could not at the same time condition such shipments so as to burden interstate commerce. In *Foster Packing Co.* v. *Haydel,* 278 U. S. 1 (1928), the Court held it was an abuse of discretion for a district court not to enter an order temporarily enjoining, as an unconstitutional burden on interstate commerce, enforcement of a Louisiana statute which permitted the shipment of shrimp from Louisiana to other States only if the heads and hulls had previously been removed. In distinguishing the *Geer* case, the following comment was made:

> "As the representative of its people, the State might have retained the shrimp for consumption and use therein. . . . But by permitting its shrimp to be

> taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause." [39]

In *Johnson* v. *Haydel,* 278 U. S. 16 (1928), the same conclusion was reached, on the basis of the *Foster Packing Co.* case, as to a similar statute relating to oysters.

Similarly in the present case, South Carolina has not attempted to retain for the use of its own people the shrimp caught in the marginal sea. Indeed, the State has been eager to stimulate interstate shipments and sales as a means of increasing the employment and income of its shrimp industry.[40] Thus even if we assume that South Carolina could retain for local consumption shrimp caught

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[39] 278 U. S. 1, 13.

[40] See note 30 *supra.* The District Court thought that the *Foster Packing Co.* and *Johnson* cases had been rendered inapplicable to this case by *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422 (1936). The California statute which the Court upheld in that case, however, was of a far different type than the one with which we are now dealing. The statute in effect limited the number of fish which could be reduced to fish flour as apart from those processed or sold in other forms. In rejecting the appellant's argument that the statute unconstitutionally burdened interstate commerce, the Court said that "It in no way limits or regulates . . . the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local." 297 U. S. 422, 425–26.

in the maritime belt to the same extent as if they were taken in inland waters, the *Geer* case would not support § 3414.

In upholding this statute, the court below adduced a reason not advanced by appellees, that the requirements as to docking, unloading, packing, and affixing a tax stamp were a proper means of insuring collection of the ⅛¢ a pound tax.[41] But the importance of having commerce between the forty-eight States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax.

Thus we hold that § 3414 violates the commerce clause of Art. I, § 8 of the Constitution.

To sum up, we hold that the District Court had jurisdiction to entertain the attacks pressed by the individual appellants, but not the corporate appellant, on all the statutes save the one relating to income taxes; that South Carolina has power, in the absence of a conflicting federal claim, to regulate fishing in the marginal sea; and that in § 3374 of the South Carolina Code, though not in §§ 3379 and 3414, the State has exercised that power in a manner consistent with restraints which the Constitution imposes upon the States. The District Court's

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[41] The District Court also said that the requirements of § 3414 were a reasonable means of maintaining the good reputation of products originating in South Carolina. But the appellees do not pretend that the statute results in better preservation of the shrimp in healthful form. Moreover, since shrimp caught off the shores of South Carolina are indistinguishable from those taken off the shores of neighboring States, purchasers would have no reason to suppose that shrimp packed in Georgia, if inferior, were products of South Carolina.

judgment refusing equitable relief is affirmed with respect to § 3374 and the income tax statute and reversed with respect to §§ 3379 and 3414.

Affirmed in part and reversed in part.

MR. JUSTICE BLACK concurs in the judgment of the Court and all of the opinion except part *Fifth.*

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, concurring.

Barring the portion entitled *Fourth,* I join the Court's opinion. While I agree that South Carolina has exceeded her power to control fisheries within her waters, I rest the invalidity of her attempt to do so on the Commerce Clause. The Court reaches this result by what I deem to be a misapplication of the Privileges-and-Immunities Clause of Art. IV, § 2, of the Constitution.

To regard any limitation upon the Privileges-and-Immunities Clause as "some unexpressed exception" and not give any clue to the basis on which such an "exception" may be implied is to leave the matter too much at large. It deals with the Constitution as though its various clauses were discrete and not a coherent scheme for government. Specifically, the Privileges-and-Immunities Clause, like the Contract Clause, must be put "in its proper perspective in our constitutional framework." *East New York Savings Bank* v. *Hahn,* 326 U. S. 230, 232.

Like other provisions of the Constitution, the Clause whereby "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" must be read in conjunction with the Tenth Amendment to the Constitution. This clause presupposes the continued retention by the States of powers

that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States. I think it is fair to summarize the decisions which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens or by discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens. It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.

When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in *McCready* v. *Virginia*, 94 U. S. 391. The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the

McCready doctrine by referring to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax* v. *Raich,* 239 U. S. 33, 39–40.

But a State cannot project its powers over its own resources by seeking to control the channels of commerce among the States. It is one thing to say that a food supply that may be reduced to control by a State for feeding its own people should be only locally consumed. The State has that power and the Privileges-and-Immunities Clause is no restriction upon its exercise. It is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. That is not the exercise of the basic right of a State to feed and maintain and give enjoyment to its own people. When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause. That is the nub of the decision in *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1. South Carolina has attempted such regulation of commerce in shrimp among the States. In doing so she has exceeded the restrictions of the Commerce Clause.

MR. JUSTICE RUTLEDGE, concurring.

I agree with the result and the Court's opinion, subject to one interpretation or qualification of the opinion's Fifth part.

The requirement that owners of boats fishing in the maritime belt dock at a South Carolina port, unload, pack, and stamp their catch (for tax purposes), before "shipping or transporting it to another state," is not merely a regu-

lation of commerce burdening it in the sense of materially increasing the shipper's costs. Many valid regulations of commerce do this. The regulation in question goes farther. It is aimed in terms directly at interstate commerce alone, and thus would seem to be discriminatory in intent and effect upon that commerce. Moreover, in my opinion, it is of such a character that, if applied, for all practical purposes it would block the commerce.

Since it was exactly that sort of state regulation the commerce clause was designed to strike down, I agree that this one cannot stand. The same considerations I also think would be applicable to nullify the license fees levied against nonresidents, since upon the record their transportation of catches would seem to be exclusively in interstate commerce, or practically so.

TAKAHASHI *v.* FISH AND GAME COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 533. Argued April 21–22, 1948.—Decided June 7, 1948.

1. A California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship," which classification included resident alien Japanese and precluded such a one from earning his living as a commercial fisherman in the ocean waters off the coast of the State, *held* invalid under the Federal Constitution and laws. Pp. 412–422.
2. For purposes of decision by this Court, it may be assumed that the object of the statute was to conserve fish in the coastal waters of the State, or to protect citizens of the State engaged in commercial fishing from the competition of Japanese aliens, or both. P. 418.
3. That the United States regulates immigration and naturalization in part on the basis of race and color classifications does not authorize adoption by a State of such classifications to prevent lawfully admitted aliens within its borders from earning a livelihood by means open to all other inhabitants. Pp. 418–420.

4. The Fourteenth Amendment and federal laws, 8 U. S. C. § 41, embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws. Pp. 419–420.
5. Whatever may be the interest of the State or its citizens in the fish in the 3-mile belt offshore, that interest does not justify the State in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all other persons to do so. Pp. 420–421.
6. Assuming their continued validity, cases sustaining state laws barring land ownership by aliens ineligible to citizenship, which rested on grounds peculiar to real property, can not be extended to control the decision in this case. P. 422.

30 Cal. 2d 719, 185 P. 2d 805, reversed.

Petitioner brought an action in a state court for mandamus to compel issuance to him of a commercial fishing license. A judgment granting the writ was reversed by the State Supreme Court, 30 Cal. 2d 719, 185 P. 2d 805. This Court granted certiorari. 333 U. S. 853. *Reversed,* p. 422.

A. L. Wirin and *Dean Acheson* argued the cause for petitioner. With them on the brief were *Charles A. Horsky* and *Fred Okrand.*

Ralph Winfield Scott, Deputy Attorney General of California, argued the cause for respondents. With him on the brief was *Fred N. Howser,* Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Attorney General Clark, Solicitor General Perlman, Philip Elman* and *James L. Morrisson* for the United States; *Arthur Garfield Hays* and *Edward J. Ennis* for the American Civil Liberties Union; *William Maslow, William Strong* and *Ambrose Doskow* for the American Jewish Congress; *Phineas Indritz* and *Jacob W. Rosenthal* for the American Veterans Committee; *Edward J. Ennis* for the Home Missions Council of North America et al.;

Saburo Kido for the Japanese American Citizens League; and *Thurgood Marshall* and *Marian Wynn Perry* for the National Lawyers Guild et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Torao Takahashi, born in Japan, came to this country and became a resident of California in 1907. Federal laws, based on distinctions of "color and race," *Toyota* v. *United States*, 268 U. S. 402, 411–412, have permitted Japanese and certain other non-white racial groups to enter and reside in the country, but have made them ineligible for United States citizenship.[1] The question presented is whether California can, consistently with the Federal Constitution and laws passed pursuant to it, use this federally created racial ineligibility for citizenship as a basis for barring Takahashi from earning his living as a commercial fisherman in the ocean waters off the coast of California.

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[1] The comprehensive laws adopted by Congress regulating the immigration and naturalization of aliens are included in Title 8 of the U. S. Code; for codification of laws governing racial and color prerequisites of aliens to citizenship see 8 U. S. C. § 703. An act adopted by the first Congress in 1790 made "free white persons" only eligible for citizenship. 1 Stat. 103. Later acts have extended eligibility of aliens to citizenship to the following groups: in 1870, "aliens of African nativity and . . . persons of African descent," 16 Stat. 254, 256; in 1940, "descendants of races indigenous to the Western Hemisphere," 54 Stat. 1137, 1140; in 1943, "Chinese persons or persons of Chinese descent," 57 Stat. 600, 601; and in 1946, Filipinos and "persons of races indigenous to India," 60 Stat. 416. While it is not wholly clear what racial groups other than Japanese are now ineligible to citizenship, it is clear that Japanese are among the few groups still not eligible, see *Oyama* v. *California*, 332 U. S. 633, 635, n. 3, and that, according to the 1940 census, Japanese aliens constituted the great majority of aliens living in the United States then ineligible for citizenship. See concurring opinion of MR. JUSTICE MURPHY in *Oyama* v. *California, supra* at 650, 665, 666, nn. 20 and 22.

Prior to 1943 California issued commercial fishing licenses to all qualified persons without regard to alienage or ineligibility to citizenship. From 1915 to 1942 Takahashi, under annual commercial fishing licenses issued by the State, fished in ocean waters off the California coast, apparently both within and without the three-mile coastal belt, and brought his fresh fish ashore for sale. In 1942, while this country was at war with Japan, Takahashi and other California residents of Japanese ancestry were evacuated from the State under military orders. See *Korematsu* v. *United States,* 323 U. S. 214. In 1943, during the period of war and evacuation, an amendment to the California Fish and Game Code was adopted prohibiting issuance of a license to any "alien Japanese." Cal. Stats. 1943, ch. 1100. In 1945, the state code was again amended by striking the 1943 provision for fear that it might be "declared unconstitutional" because directed only "against alien Japanese"; [2] the new amendment banned issuance of licenses to any "person ineligible to citizenship," which classification included Japanese. Cal. Stats. 1945, ch. 181.[3] Because of this state

[2] Report of the California Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945, pp. 5–6.

[3] As amended the code section now reads: *"Persons required to procure license: To whom issuable.* Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship." Cal. Fish and Game Code § 990. In 1947 the code was

provision barring issuance of commercial fishing licenses to persons ineligible for citizenship under federal law, Takahashi, who met all other state requirements, was denied a license by the California Fish and Game Commission upon his return to California in 1945.

Takahashi brought this action for mandamus in the Superior Court of Los Angeles County, California, to compel the Commission to issue a license to him. That court granted the petition for mandamus. It held that lawful alien inhabitants of California, despite their ineligibility to citizenship, were entitled to engage in the vocation of commercial fishing on the high seas beyond the three-mile belt on the same terms as other lawful state inhabitants, and that the California code provision denying them this right violated the equal protection clause of the Fourteenth Amendment. The State Supreme Court, three judges dissenting, reversed, holding that California had a proprietary interest in fish in the ocean waters within three miles of the shore, and that this interest justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish within or without the three-mile coastal belt and bringing them to California for commercial purposes. 30 Cal. 2d 719, 185 P. 2d 805.[4] To review this question

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amended to permit "any person, not a citizen of the United States," to obtain hunting and sport fishing licenses, both of which had been denied to "alien Japanese" and to persons "ineligible to citizenship" under the 1943 and 1945 amendments. Cal. Stats. 1947, c. 1329; Cal. Fish and Game Code §§ 427, 428.

[4] The Superior Court first ordered issuance of a commercial fishing license authorizing Takahashi to bring ashore "catches of fish from the waters of the high seas beyond the State's territorial jurisdiction." After appeal to the State Supreme Court by the State Commission the Superior Court amended its judgment so as to order a commercial license authorizing Takahashi to bring in catches of fish taken from the three-mile ocean belt adjacent to the California coast as well as from the high seas. The State Supreme Court held that the

of importance in the fields of federal-state relationships and of constitutionally protected individual equality and liberty, we granted certiorari.

We may well begin our consideration of the principles to be applied in this case by a summary of this Court's holding in *Truax* v. *Raich,* 239 U. S. 33, not deemed controlling by the majority of the California Supreme Court, but regarded by the dissenters as requiring the invalidation of the California law. That case involved an attack upon an Arizona law which required all Arizona employers of more than five workers to hire not less than eighty (80) per cent qualified electors or native-born citizens of the United States. Raich, an alien who worked as a cook in a restaurant which had more than five employees, was about to lose his job solely because of the state law's coercive effect on the restaurant owner. This Court, in upholding Raich's contention that the Arizona law was invalid, declared that Raich, having been lawfully admitted into the country under federal law, had a federal privilege to enter and abide in "any State in the Union" and thereafter under the Fourteenth Amendment to

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Superior Court was without jurisdiction to amend its judgment after appeal and accordingly treated the amended judgment as void. California argues here that its State Fish and Game Commission is authorized by statute to issue only one type of commercial fishing license, namely, one permitting ocean fish to be brought ashore whether caught within or without the three-mile belt, that the Superior Court's first judgment ordering issuance of a license limited to catches of high seas fish directed the Commission to do something it was without authority to do, and that on this ground we should affirm the state court's denial of the requested license. The State Supreme Court did not, however, decide the case on that ground, but ruled against petitioner on the ground that the challenged code provision was valid under the Federal Constitution and that the Commission's refusal to grant a license was required by its terms. Since the state court of last resort relied solely upon federal grounds for its decision, we may properly review its action here.

enjoy the equal protection of the laws of the state in which he abided; that this privilege to enter in and abide in any state carried with it the "right to work for a living in the common occupations of the community," a denial of which right would make of the Amendment "a barren form of words." In answer to a contention that Arizona's restriction upon the employment of aliens was "reasonable" and therefore permissible, this Court declared:

> "It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Truax* v. *Raich, supra* at 42.

Had the *Truax* decision said nothing further than what is quoted above, its reasoning, if followed, would seem to require invalidation of this California code provision barring aliens from the occupation of fishing as inconsistent with federal law, which is constitutionally declared to be "the supreme Law of the Land." However,

the Court there went on to note that it had on occasion sustained state legislation that did not apply alike to citizens and non-citizens, the ground for the distinction being that such laws were necessary to protect special interests either of the state or of its citizens as such. The *Truax* opinion pointed out that the Arizona law, aimed as it was against employment of aliens in *all* vocations, failed to show a "special public interest with respect to any particular business . . . that could possibly be deemed to support the enactment." The Court noted that it had previously upheld various state laws which restricted the privilege of planting oysters in the tidewater rivers of a state to citizens of that state, and which denied to aliens within a state the privilege of possessing a rifle and of shooting game within that state; it also referred to decisions recognizing a state's broad powers, in the absence of overriding treaties, to restrict the devolution of real property to non-aliens.[5]

California now urges, and the State Supreme Court held, that the California fishing provision here challenged falls within the rationale of the "special public interest" cases distinguished in the *Truax* opinion, and thus that the state's ban upon commercial fishing by aliens ineligible to citizenship is valid. The contention is this: California owns the fish within three miles of its coast as a trustee for all California citizens as distinguished from its non-citizen inhabitants; as such trustee-owner, it has complete power to bar any or all aliens from fishing in the three-mile belt as a means of conserving the supply of fish; since migratory fish caught while swimming in the three-mile belt are indistinguishable from those caught while swimming in the adjacent high seas, the State, in

[5] The opinion cited the following cases: *McCready* v. *Virginia,* 94 U. S. 391; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Hauenstein* v. *Lynham,* 100 U. S. 483; and *Blythe* v. *Hinckley,* 180 U. S. 333.

order to enforce its three-mile control, can also regulate the catching and delivery to its coast of fish caught beyond the three-mile belt under this Court's decision in *Bayside Fish Co.* v. *Gentry,* 297 U. S. 422. Its law denying fishing licenses to aliens ineligible for citizenship, so the state's contention goes, tends to reduce the number of commercial fishermen and therefore is a proper fish conservation measure; in the exercise of its power to decide what groups will be denied licenses, the State has a right, if not a duty, to bar first of all aliens, who have no community interest in the fish owned by the State. Finally, the legislature's denial of licenses to those aliens who are "ineligible to citizenship" is defended as a reasonable classification, on the ground that California has simply followed the Federal Government's lead in adopting that classification from the naturalization laws.

First. The state's contention that its law was passed solely as a fish conservation measure is vigorously denied. The petitioner argues that it was the outgrowth of racial antagonism directed solely against the Japanese, and that for this reason alone it cannot stand. See *Korematsu* v. *United States, supra* at 216; *Kotch* v. *Board of River Pilot Comm'rs,* 330 U. S. 552, 556; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *In re Ah Chong,* 2 F. 733, 737. We find it unnecessary to resolve this controversy concerning the motives that prompted enactment of the legislation. Accordingly, for purposes of our decision we may assume that the code provision was passed to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons.

Second. It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within

its borders from earning a living in the same way that other state inhabitants earn their living. The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See *Hines* v. *Davidowitz,* 312 U. S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.[6] Moreover, Congress, in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 16 Stat. 140, 144, 8 U. S. C. § 41.

The protection of this section has been held to extend to aliens as well as to citizens.[7] Consequently the section

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[6] *Truax* v. *Raich, supra; Chy Lung* v. *Freeman,* 92 U. S. 275, 280; see *Hines* v. *Davidowitz, supra* at 65–68.

[7] *Yick Wo* v. *Hopkins, supra* at 369; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 696; *In re Tiburcio Parrott,* 1 F. 481, 508–509; *Fraser* v. *McConway & Torley Co.,* 82 F. 257.

and the Fourteenth Amendment on which it rests in part protect "all persons" against state legislation bearing unequally upon them either because of alienage or color. See *Hurd* v. *Hodge,* 334 U. S. 24. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.

All of the foregoing emphasizes the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization. The state's law here cannot be supported in the employment of this legislative authority because of policies adopted by Congress in the exercise of its power to treat separately and differently with aliens from countries composed of peoples of many diverse cultures, races, and colors. For these reasons the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.

Third. We are unable to find that the "special public interest" on which California relies provides support for this state ban on Takahashi's commercial fishing. As before pointed out, California's claim of "special public interest" is that its citizens are the collective owners of fish swimming in the three-mile belt. It is true that this Court did long ago say that the citizens of a state collectively own "the tide-waters . . . and the fish in them, so far as they are capable of ownership while running." *McCready* v. *Virginia,* 94 U. S. 391, 394. *Cf. United States* v. *California,* 332 U. S. 19, 38; *Toomer* v. *Witsell, ante,* p. 385. The *McCready* case upheld a Virginia law

which prohibited citizens of other states from planting oysters in a Virginia tidewater river. Though the *McCready* case has been often distinguished, its rationale has been relied on in other cases, including *Geer* v. *Connecticut,* 161 U. S. 519. That decision, where only the commerce clause was involved, sustained a state law that, in order to restrict the use of game to the people of the state, prohibited the out-of-state transportation of game killed within the state. On the other hand, where Louisiana laws declared that the state owned all shrimp within the waters of the state, but permitted ultimate sale and shipment of shrimp for consumption outside that state's boundaries, Louisiana was denied power under the commerce clause to require the local processing of shrimp taken from Louisiana marshes as a prerequisite to out-of-state transportation. *Foster Packing Co.* v. *Haydel,* 278 U. S. 1. In the absence of overriding federal treaties, this Court sustained a state law barring aliens from hunting wild game in the interest of conserving game for citizens of the state against due process and equal protection challenges. *Patsone* v. *Pennsylvania,* 232 U. S. 138. Later, however, the Federal Migratory Bird Treaty Act of 1918, 40 Stat. 755, was sustained as within federal power despite the claim of Missouri of ownership of birds within its boundaries based on prior statements as to state ownership of game and fish in the *Geer* case. *Missouri* v. *Holland,* 252 U. S. 416. The Court was of opinion that "To put the claim of the State upon title is to lean upon a slender reed." P. 434. We think that same statement is equally applicable here. To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

This leaves for consideration the argument that this law should be upheld on authority of those cases which have sustained state laws barring aliens ineligible to citizenship from land ownership.[8] Assuming the continued validity of those cases,[9] we think they could not in any event be controlling here. They rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property. They cannot be extended to cover this case.

The judgment is reversed and remanded for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE agrees, concurring.

The opinion of the Court, in which I join, adequately expresses my views as to all but one important aspect of this case. That aspect relates to the fact that § 990 of the California Fish and Game Code, barring those ineligible to citizenship from securing commercial fishing licenses, is the direct outgrowth of antagonism toward persons of Japanese ancestry. Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality.

The statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century.

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[8] *Terrace* v. *Thompson*, 263 U. S. 197; *Porterfield* v. *Webb*, 263 U. S. 225; *Webb* v. *O'Brien*, 263 U. S. 313; *Frick* v. *Webb*, 263 U. S. 326.

[9] See *Oyama* v. *California*, 332 U. S. 633, 646, 649, 672.

See concurring opinion in *Oyama* v. *California,* 332 U. S. 633, 650, and dissenting opinion in *Korematsu* v. *United States,* 323 U. S. 214, 233. That fever, of course, is traceable to the refusal or the inability of certain groups to adjust themselves economically and socially relative to residents of Japanese ancestry. For some years prior to the Japanese attack on Pearl Harbor, these protagonists of intolerance had been leveling unfounded accusations and innuendoes against Japanese fishing crews operating off the coast of California. These fishermen numbered about a thousand and most of them had long resided in that state. It was claimed that they were engaged not only in fishing but in espionage and other illicit activities on behalf of the Japanese Government. As war with Japan approached and finally became a reality, these charges were repeated with increasing vigor. Yet full investigations by appropriate authorities failed to reveal any competent supporting evidence; not even one Japanese fisherman was arrested for alleged espionage. Such baseless accusations can only be viewed as an integral part of the long campaign to undermine the reputation of persons of Japanese background and to discourage their residence in California. See McWilliams, Prejudice (1944), ch. VII.

More specifically, these accusations were used to secure the passage of discriminatory fishing legislation. But such legislation was not immediately forthcoming. The continued presence in California of the Japanese fishermen without the occurrence of any untoward incidents on their part served for a time as adequate and living refutation of the propaganda. Then came the evacuation of all persons of Japanese ancestry from the West Coast. See *Korematsu* v. *United States, supra.* Once evacuation was achieved, an intensive campaign was begun to prevent the return to California of the evacuees.

All of the old charges, including the ones relating to the fishermen, were refurbished and augmented. This time the Japanese were absent and were unable to provide effective opposition. The winds of racial animosity blew unabated.

During the height of this racial storm in 1943, numerous anti-Japanese bills were considered by the California legislators. Several amendments to the Alien Land Law were enacted. And § 990 of the Fish and Game Code was altered to provide that "A commercial fishing license may be issued to any person other than an alien Japanese." No pretense was made that this alteration was in the interests of conservation. It was made at a time when all alien Japanese were excluded from California, with no immediate return indicated; thus the banning of fishing licenses for them could have no early effect upon the conservation of fish. Moreover, the period during which this amendment was passed was one in which both federal and state authorities were doing their utmost to encourage greater food production for wartime purposes. The main desire at this time was to increase rather than to decrease the catch of fish. Certainly the contemporaneous bulletins and reports of the Bureau of Marine Fisheries of California did not indicate the existence of any conservation problem due to an excess number of fishermen. See Thirty-Eighth Biennial Report (July 1, 1944), pp. 33–36; Fish Bulletin No. 58, for the year 1940; Fish Bulletin No. 59, for the years 1941 and 1942.

These circumstances only confirm the obvious fact that the 1943 amendment to § 990 was intended to discourage the return to California of Japanese aliens. By taking away their commercial fishing rights, the lives of those aliens who plied the fisherman's trade would be made more difficult and unremunerative. And the non-Japanese fishermen would thereby be free from the compe-

tition afforded by these aliens. The equal protection clause of the Fourteenth Amendment, however, does not permit a state to discriminate against resident aliens in such a fashion, whether the purpose be to give effect to racial animosity or to protect the competitive interests of other residents.

The 1945 amendment to § 990 which is now before us stands in no better position than the 1943 amendment. This later alteration eliminated the reference to "alien Japanese" and substituted therefor "a person ineligible to citzenship." Adoption of this change also occurred during a period when anti-Japanese agitation in California had reached one of its periodic peaks. The announcement of the end of the Japanese exclusion orders, plus this Court's decision in *Ex parte Endo,* 323 U. S. 283, made the return to California of many of the evacuees a reasonable certainty. The prejudices, the antagonisms and the hatreds were once again aroused, punctuated this time by numerous acts of violence against the returning Japanese Americans. Another wave of anti-Japanese proposals marked the 1945 legislative session. It was in this setting that the amendment to § 990 was proposed and enacted in 1945.

It is of interest and significance that the amendment in question was proposed by a legislative committee devoted to Japanese resettlement problems, not by a committee concerned with the conservation of fish. The Senate Fact-Finding Committee on Japanese Resettlement issued a report on May 1, 1945. This report dealt with such matters as the Alien Land Law, the Japanese language schools, dual citizenship and the Tule Lake riot. And under the heading "Japanese Fishing Boats" (pp. 5–6) appeared this explanation of the proposed amendment to § 990:

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> "The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."

Not a word was said in this report regarding the need for the conservation of fish or the necessity of limiting the number of fishermen. The obvious thought behind the amendment was to attempt to legalize the discrimination against Japanese alien fishermen by dropping the specific reference to them.

The proposed revision was adopted. The trial court below correctly described the situation as follows: "As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate alien Japanese from those entitled to a commercial fishing license by means of description rather than by name. To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for

profit, and to bring them to shore for the purpose of selling the same in a fresh state . . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, ..."

We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests. We need but unbutton the seemingly innocent words of § 990 to discover beneath them the very negation of all the ideals of the equal protection clause. No more is necessary to warrant a reversal of the judgment below.

MR. JUSTICE REED, dissenting.

The reasons which lead me to conclude that the judgment of the Supreme Court of California should be affirmed may be briefly stated. As fishing rights have been treated traditionally as a natural resource, in the absence of federal regulation, California as a sovereign state has power to regulate the taking and handling of

fish in the waters bordering its shores.[1] It is, I think, one of the natural resources of the state that may be preserved from exploitation by aliens.[2] The ground for this power in the absence of any exercise of federal authority is California's authority over its fisheries.

The right to fish is analogous to the right to own land, a privilege which a state may deny to aliens as to land within its borders. *Terrace* v. *Thompson*, 263 U. S. 197.[3] It is closely akin to the right to hunt, a privilege from which a state may bar aliens, if reasonably deemed advantageous to its citizens.[4] A state's power has even been

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[1] *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 425.

The statute, see note 3 of the Court's opinion for the text, seems obviously to cast no burden on commerce.

A Washington statute similar to the one now before us was considered in *Lubetich* v. *Pollock*, 6 F. 2d 237.

[2] Even citizens of other states have been excluded by a state from such opportunities. *McCready* v. *Virginia*, 94 U. S. 391 (planting oyster beds). Fishing licenses discriminating between residents and non-residents are permissible. *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510.

[3] The right of an alien to own land is controlled by the law of the state in which the land is located. Such was the rule of the common law. *Collingwood* v. *Pace*, 1 Vent. 413, 86 Eng. Rep. 262. That has long been the law of nations, 2 Vattel, Law of Nations (1883) c. 8, § 114, and has been accepted in this country. *Chirac* v. *Chirac*, 2 Wheat. 259; *Levy* v. *M'Cartee*, 6 Pet. 102, 113; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Blythe* v. *Hinckley*, 180 U. S. 333, 341. Whether the philosophical basis of that power, or the power over fish and game, is a theory of ownership or trusteeship for its citizens or residents or conservation of natural resources or protection of its land or coasts is not material. The right to control the ownership of land rests in sovereign governments and, in the United States, it rests with the individual states in the absence of federal action by treaty or otherwise.

[4] *Patsone* v. *Pennsylvania*, 232 U. S. 138. In expressing the conclusion of the Court, Mr. Justice Holmes phrased the rule as follows, pp. 145–46: "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases."

held to extend to the exclusion of aliens from the operation of pool and billiard halls when a city deemed them not as well qualified as citizens for the conduct of a business thought to have harmful tendencies. *Clarke* v. *Deckebach,* 274 U. S. 392.[5]

The Federal Government has not pursued a policy of equal treatment of aliens and citizens. Citizens have rights superior to those of aliens in the ownership of land and in exploiting natural resources.[6] Perhaps Congress as a matter of immigration policy may require that states open every door of opportunity in America to all resident aliens, but until Congress so determines as to fisheries, I do not feel that the judicial arm of the Government should require the states to admit all aliens to this privilege.

Certainly *Truax* v. *Raich,* 239 U. S. 33, upon which the majority opinion appears to rely in holding that the California statute denies equal protection in attempting to classify aliens by putting restrictions on their right to land fish, is not an authority for such a decision. The

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[5] In that case a unanimous Court, speaking through Mr. Justice Stone, said, p. 396:

"The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, . . . it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification."

[6] The United States limits the rights of aliens as compared with citizens in land ownership in its territories, 8 U. S. C. §§ 71–86; in disposition of mineral lands, 30 U. S. C. § 181; of public lands, 43 U. S. C. § 161; in engaging in coastwise trade, 46 U. S. C. §§ 11, 13; in operating aircraft, 49 U. S. C. §§ 176 (c), 521.

It was deemed necessary to limit the benefits of the Emergency Relief Appropriation Act of 1938 to aliens who had "filed a declaration of intention to become an American citizen . . . ." 52 Stat. 809, 813.

power of a state to discriminate against aliens on public works and the exploitation of natural resources was recognized in that case.[7] And, at the very time that it was under consideration, this Court also had before it *Heim* v. *McCall,* 239 U. S. 175.[8] In that case, Heim attacked the constitutionality of a New York statute which provided that "In the construction of public works by the State or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York." [9] A unanimous court held that the statute, which was attacked on the ground that it denied aliens their rights under the privileges and immunities, due process, and equal protection clauses of the Constitution, was a constitutional exercise of state power as applied to the construction of New York City subways by private contractors.[10]

[7] 239 U. S. 33, 39–40: "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. . . . The case now presented is not within these decisions, or within those relating to the devolution of real property . . . ; and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

[8] *Truax* v. *Raich, supra,* was argued October 15, 1915, and decided November 1, 1915; *Heim* v. *McCall, supra,* was argued October 12, 1915, and decided November 29, 1915.

[9] 239 U. S. 175, 176–77.

[10] The problem of natural resources was not directly discussed in the opinion. But it is clear that the Court was not unaware of the relation of its decision to the natural resources cases. See 239 U. S. 175, 194. The fact that this case was before the Court at the same time as *Truax* v. *Raich,* probably explains the careful reservation of the natural resources and public works problems in that case. See 239 U. S. 33, 39–40.

The Constitution that permits the bar of aliens from public works surely must permit their bar from state fishing rights. A state has power to exclude from enjoyment of its natural resources those who are unwilling or unable to become citizens.

If aliens, as I think they can, may be excluded by a state from fishing privileges, I see no reason why the classification established by California excluding only aliens ineligible to citizenship is prohibited by the Constitution. *Terrace* v. *Thompson,* 263 U. S. 197, 220. Whatever we may think of the wisdom of California's statute, we should intervene only when we conclude the state statute passes constitutional limits.

MR. JUSTICE JACKSON joins in this dissent.

PHYLE *v.* DUFFY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 655. Argued April 20–21, 1948.—Decided June 7, 1948.

Petitioner was convicted of murder, sentenced to death, and imprisoned pending execution. In compliance with a California statute forbidding the execution of an insane person and prescribing a procedure for obtaining a judicial determination of a prisoner's sanity (to be initiated by the warden if "there is good reason to believe" that he has become insane), petitioner was adjudged insane and taken to a state hospital. Thereafter, without notice or hearing, the medical superintendent of the hospital certified that petitioner's reason had been restored; and he was returned to prison and a new date was set for his execution. He instituted a habeas corpus proceeding in the State Supreme Court; but that court denied relief. *Held:* Since the judgment denying habeas corpus may rest on the adequate non-federal ground that petitioner had pursued the wrong state remedy, it is not appropriate for this Court at this time to pass on the federal constitutional questions presented. Pp. 432–444.

(a) It appears that there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to

compel the warden to again initiate judicial proceedings to determine petitioner's sanity and that in such mandamus proceeding the court will hear and consider evidence to determine whether there is "reason to believe" that petitioner is insane. Pp. 440–442.

(b) *Nobles* v. *Georgia*, 168 U. S. 398, distinguished. Pp. 437–439.

(c) A declaration by the Attorney General of California that petitioner has not availed himself of the appropriate state remedy is entitled to great weight, in the absence of controlling state statutes and court decisions. P. 441.

(d) Although mandamus might not be available under California law if there were another remedy, so far as here appears, and in the light of the decision of the State Supreme Court, mandamus to compel action by the warden is the only remedy available to the petitioner. P. 442.

(e) This Court can not say at this time that the remedy by mandamus available to petitioner under California law will be less than a substantial equivalent of one whereby he could apply directly to a court for a full hearing. Pp. 442–444.

30 Cal. 2d 838, 186 P. 2d 134, certiorari dismissed.

In a habeas corpus proceeding instituted by petitioner in the Supreme Court of California, that court denied relief. 30 Cal. 2d 838, 186 P. 2d 134. This Court granted certiorari. 333 U. S. 841. *Certiorari dismissed*, p. 444.

Morris Lavine argued the cause and filed a brief for petitioner.

Clarence A. Linn, Deputy Attorney General of California, argued the cause for respondent. With him on the brief was *Fred N. Howser*, Attorney General.

Mr. Justice Black delivered the opinion of the Court.

The petitioner is under sentence of death for murder in the first degree imposed by a California superior court and affirmed by the State Supreme Court. 28 Cal. 2d 671, 171 P. 2d 428. The validity of that sentence is

not here challenged.[1] But § 1367 of the California Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Thus if petitioner is insane, California law prohibits his execution under the death sentence which he received. The legal questions here presented relate to the procedures adopted by California to determine whether petitioner is sane or insane as a matter of fact.

It is petitioner's contention that, though having been pronounced insane in a judicial proceeding after his conviction, and though he in fact is still insane, he is about to be executed because a state doctor, acting under authority of state statutes, has declared him restored to sanity. The doctor reached his determination without notice or hearings, and without any opportunity on petitioner's part to obtain an original court hearing and adjudication of his sanity, or even to obtain a court review of the doctor's conclusion that he is sane. This procedure it is argued constitutes a denial to petitioner of

[1] The opinion of the State Supreme Court affirming petitioner's sentence shows: Upon arraignment in the Superior Court counsel was appointed for petitioner at his request. His pleas were "Not guilty" and "Not guilty by reason of insanity." Later petitioner informed his counsel that he wished to withdraw these pleas and enter a plea of guilty. The trial judge then examined petitioner at length, satisfied himself that the change of plea was voluntarily entered by petitioner with full knowledge of his legal rights, and then accepted it. Evidence was then taken by the court to determine the degree of the murder and to fix the punishment. Two physicians appointed by the court testified that in their judgment petitioner was sane. Other witnesses testified to the facts of the crime. The murder was committed by petitioner while he was in the act of perpetrating a robbery. During the entire proeeedings, so the State Supreme Court found from the record, the appointed counsel participated and represented petitioner "with fidelity and proficiency." *People* v. *Phyle*, 28 Cal. 2d 671, 171 P. 2d 428.

that due process of law guaranteed him by the Fourteenth Amendment.

This contention was urged upon the California Supreme Court in habeas corpus proceedings there instituted. That court entertained and considered the petition, but, with two judges dissenting, denied relief, sustaining the validity of the power of the state's executive agents to follow the prescribed statutory procedures. 30 Cal. 2d 838, 186 P. 2d 134. We granted certiorari because of the serious nature of the due process contentions presented in the petition. 333 U. S. 841. Here the California attorney general, while supporting the State Supreme Court's denial of habeas corpus, asserts that California affords petitioner an adequate judicial remedy by way of mandamus, a procedure which has not yet been sought by petitioner.

The California procedure may perhaps be better understood by explaining the application of the controlling California statutes to petitioner's case. While he was in prison awaiting execution of the death sentence a question arose concerning the petitioner's sanity at that time. Section 3701 of the State Penal Code [2] prescribes that if "there is good reason to believe" that a defendant under sentence of death "has become insane, the warden must call such fact to the attention of the district attorney." It is the district attorney's "duty" immediately

[2] "3701. Insanity of defendant, how determined. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry."

to institute proceedings in an appropriate trial court to determine the sanity of the defendant, and the court "must at once" summon a jury of twelve to "hear such inquiry." In petitioner's case this prescribed course was followed, a judicial hearing was held as provided by § 3702,[3] and petitioner was adjudged insane. In accordance with § 3703 [4] the court then ordered that petitioner "be taken to a state hospital for the insane and be there kept in safe confinement until his reason is restored." It will be noted that the petitioner obtained a judicial hearing as to sanity only because the warden instituted proceedings after determining that there was "good reason to believe" that the petitioner was insane. Thus, the opportunity for a person under sentence of death to have a hearing before judge and jury on the question of his sanity depends in the first instance solely on the warden.

After adjudication of insanity the petitioner was taken to a state hospital for the insane in compliance with the trial court's order of commitment. In accordance with § 3704 [5] the warden then suspended the death sen-

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[3] "3702. Duty of district attorney upon hearing. The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court."

[4] "3703. Convict found insane. The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

[5] "3704. Convict found sane: Duties of warden. If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a

tence and delivered certified copies of the court's order to the governor and to the medical superintendent of the state hospital to which petitioner was sent. As § 3704 provides, the superintendent was directed that when petitioner "recovers his reason," the superintendent "must certify that fact" to the governor, who is then required to issue to the warden his warrant appointing a day for the execution of the judgment. The warden then returns the defendant to the state prison pending the execution of the judgment. This course was followed with reference to the petitioner. Eighteen days after his admission to the state hospital the medical superintendent certified to the governor that the petitioner was then sane. He was returned to the custody of the prison warden, and the governor set a new date for his execution.

The medical superintendent's determination of petitioner's sanity was based on his own *ex parte* investigation, no notice or hearings having been afforded petitioner or any person on his behalf. It is thus clear that the California statutory scheme here challenged provides neither an administrative nor a judicial hearing as a prerequisite to a determination that a condemned defendant judicially adjudicated to be insane has been restored to sanity; one man in an *ex parte* investigation decides the question upon which hangs the defendant's life, in the absence of a later request by the prison warden for

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certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

a judicial hearing on the ground that there is then "reason to believe" the defendant has become insane.

The holding of the State Supreme Court in the habeas corpus proceeding was:

> "There is no authority . . . for the proposition that defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital. In fact, section 3700 of the Penal Code [6] expressly prohibits such a proceeding. Once the superintendent certifies that defendant is sane, he is remanded to the custody of the warden for execution and 'No judge, court or other officer other than the Governor' can then suspend the execution of the judgment, 'except the warden of the State Prison to whom he is delivered. . . .'" *In re Phyle,* 30 Cal. 2d at 842–843, 186 P. 2d at 137.

For the statements in its opinion that the due process clause of the Fourteenth Amendment conferred no right on a condemned defendant to any kind of judicial adjudication or review on the question of sanity, the State Supreme Court primarily relied on *Nobles* v. *Georgia,* 168 U. S. 398. We do not think that either the actual holding or what was said in the opinion in that case would necessarily require a rejection of the contentions made here against the California procedures.

The Georgia law under scrutiny in the *Nobles* case provided that the sanity of a person previously condemned to death should be determined by a tribunal formed in the following manner: "The sheriff of the

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[6] "3700. Governor may suspend. No judge, court, or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

county, *with the concurrence and assistance of the Ordinary thereof,* [emphasis added] shall summon a jury of twelve men to inquire into such insanity . . . ." If this tribunal found insanity the sheriff was required to suspend execution of sentence and report his action to the presiding judge. Restoration of sanity so as to justify execution was to be determined by the presiding judge "by inquisition or otherwise." Thus "the only question" in the *Nobles* case, as the Court there said, was "whether . . . in order to constitute due process of law" the question of insanity of a condemned defendant must "be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and *quasi* judicial process is created for the purpose of investigating the suggestion." P. 405. This agency for a hearing to inquire into the prisoner's sanity, composed as it was of sheriff, county judge and jury, was referred to as an "apt and special tribunal." There is provision in the California statutes for a hearing before a judge and jury when, but only when, the warden is of opinion that there "is reason to believe" a defendant is insane.

The *Nobles* case does stand for the proposition that a condemned defendant has no "absolute right" to a hearing on the question of his sanity on his mere "suggestion." Such an absolute right, this Court thought, would make the punishment of a defendant "depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial." P. 406. For this reason, the Court in the *Nobles* opinion cited and quoted from legal commentators and from judicial opinions which emphasized, as the opinion in the *Nobles* case itself emphasized, the importance of leaving to the "discretion of a judge" the most appropriate procedure for determining

the sanity of a defendant already sentenced to death. It was in this connection that the Court made the statement in the *Nobles* case upon which the California Supreme Court particularly relied, that "the manner in which such question should be determined was purely a matter of legislative regulation."

Reading this statement in its context and in relation to the Georgia procedure, we do not understand that the Court in the *Nobles* case passed upon the question here urged: whether a state which bars the execution of insane persons can submit to a single individual this question, crucial to life, to be decided by that individual *ex parte,* with or without notice and hearings as the individual may choose, and without any judicial supervision, control or review whatever. The *Nobles* case we do understand to be an authority for the principle that a condemned defendant cannot automatically block execution by suggestions of insanity, and that a state tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death.[7]

What has been said previously indicates the gravity of the questions here raised under the due process clause as heretofore construed by this Court, both the contention that execution of an insane man is offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, *Adamson* v. *California,* 332 U. S. 46; *Carter* v. *Illinois,* 329 U. S. 173, and the different contention that life shall not be taken by a state as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer. See *Ng Fung Ho* v. *White,* 259 U. S.

[7] See cases collected in 49 A. L. R. 804, *et seq.*

276.[8] It is not appropriate for us to pass on such constitutional questions in this habeas corpus case if, as the California attorney general contends, there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to compel the warden to initiate judicial proceedings, and in which mandamus proceedings the court will hear and consider evidence to determine whether there is "reason to believe" that the petitioner is insane. *New York ex rel. Whitman* v. *Wilson, Warden,* 318 U. S. 688; *Woods* v. *Nierstheimer,* 328 U. S. 211; *Carter* v. *Illinois,* 329 U. S. 173. See also *Simon* v. *Craft,* 182 U. S. 427, 437.

The State Supreme Court in denying habeas corpus said that the state statutes made "no provision for a judicial determination of the question of the sanity of a defendant delivered to the warden of a state prison for execution except as set forth in" § 3701. That is the section which requires a judicial inquiry with a court and jury only when and if the warden certifies that "there is good reason to believe" that a person sentenced to death has "become insane." But it does not necessarily follow from the fact that petitioner cannot obtain a full-fledged judicial hearing as to sanity on his own motion made directly to a state court that he is without some other adequate state remedy. And the state attorney general asserts here that the petitioner does have an "ample remedy, if the facts support him, by application to the California courts for a writ of mandamus" to compel the warden to institute proceedings under § 3701.

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[8] See also *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369–370; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386, 392; *Duncan* v. *Kahanamoku,* 327 U. S. 304, 322; *Dent* v. *West Virginia,* 129 U. S. 114, 123–124; *Brown* v. *New Jersey,* 175 U. S. 172, 176; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 49–54, and concurring opinion, Brandeis, J., at 76–78. *Cf. United States* v. *Ju Toy,* 198 U. S. 253, 263; *Simon* v. *Craft,* 182 U. S. 427, 436.

Thus we have an unequivocal declaration by the state attorney general that petitioner has not attempted to take advantage of an available state remedy. The attorney general is the highest non-judicial legal officer of California, and is particularly charged with the duty of supervising administration of the criminal laws.[9] His statement on this question is entitled to great weight in the absence of controlling state statutes and court decisions.[10] Nor is there anything in the State Supreme Court's opinion in this case that need be considered in conflict with the attorney general's opinion. While that court held that there was no statutory provision for petitioner to obtain a sanity hearing except through action by the warden as prescribed in § 3701, it did not hold or even consider whether there was judicial power under state law to compel the warden to do his duty under § 3701. It did declare, clearly and emphatically, that the statute imposed a mandatory obligation on the warden to initiate judicial proceedings if there was good reason to believe a condemned defendant insane, an obligation that continued to rest upon the warden even after certification of restoration to sanity by the medical superintendent. The Supreme Court also declared that this duty would continue up to the very time of execution. Failure of the warden to perform this obligation, so the court said, would be a "violation of . . . section 1367," which section prohibits execution of an insane man. In view of this mandatory obligation upon the warden to initiate proceedings if "there is good reason to believe" a defendant sentenced to death is insane, it would be somewhat anomalous, to say the least, if California courts were wholly without power to correct an executive agent's abuse of authority in a

[9] California Government Code §§ 12510–12512, 12519, 12550–12553.

[10] See *Union Ins. Co.* v. *Hoge*, 21 How. 35, 66; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Driscoll* v. *Edison Co.*, 307 U. S. 104, 115.

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matter of such great significance as the execution of insane persons.

The jurisdiction of California courts to issue mandamus has its source in Art. VI, §§ 4, 4b, 5 of the state constitution. The writ can issue to any inferior tribunal or person to compel an act which the law specifically enjoins. Code of Civil Procedure of California, § 1085. It has been held that the writ may issue against the secretary of state, *Hutchinson* v. *Brown,* 122 Cal. 189, 54 P. 738, or even against the governor. *Elliott* v. *Pardee, Governor,* 149 Cal. 516, 520, 86 P. 1087, 1089.

Petitioner contends, however, that mandamus would not be available under California law if there is another adequate remedy, see *Kahn* v. *Smith,* 23 Cal. 2d 12, 142 P. 2d 13, that here habeas corpus is available, and hence mandamus is not. This contention is fully answered by the State Supreme Court's opinion in this case, holding that neither habeas corpus nor any other remedy is available to test sanity of a condemned defendant, except that remedy under § 3701 which only the warden can institute. Hence, so far as it here appears, mandamus to compel action by the warden is the only available remedy.

Petitioner contends that this remedy is inadequate because under California law no relief could be hoped for in a mandamus proceeding without a showing that the warden's non-action was arbitrary and capricious. We cannot know, of course, just what precise standards the State Supreme Court may hold must be met by petitioner in order to obtain the judicial inquiry provided in § 3701. We are persuaded by the attorney general's statements and brief, and by the state constitution, state statutes, and state decisions to which he referred, that mandamus is probably available, and that in a mandamus proceeding some issues of fact concerning petitioner's sanity can be drawn by the parties, resolved by the courts,

and provide support for relief. Different language has been used in different opinions concerning the conditions upon which the writ will issue in California. Although it has been said that generally the writ will issue only to correct an abuse of discretion, *Bank of Italy* v. *Johnson,* 200 Cal. 1, 31–33, 251 P. 784, 795–796 and cases cited, it has also been pointed out that in some circumstances writs can issue to compel action in a particular way. *Wood* v. *Strother,* 76 Cal. 545, 549, 18 P. 766, 769; *Landsborough* v. *Kelly,* 1 Cal. 2d 739, 744, 37 P. 2d 93, 95.

In considering what the issues may be in a mandamus proceeding, it must be borne in mind that the warden is under a mandatory duty to initiate judicial proceedings, not *when* a defendant is insane, but when *"there is good reason to believe"* he is insane. We cannot say at this time that California's remedy by mandamus will be less than a substantial equivalent[11] of one which authorized him to apply directly to a court for a full hearing. For this Court held in *Nobles* v. *Georgia, supra,* that in the absence of sufficient reasons for holding a full hearing into the sanity of a defendant sentenced to death, a state judge may deny such a hearing consistently with due process. As previously pointed out, the decision in the *Nobles* case emphasized that due process of law had never necessarily envisioned a full court hearing every time the insanity of a condemned defendant was suggested. Applications for inquiries into sanity made by a defendant sentenced to death, unsupported by facts, and buttressed by no good reasons for believing that the defendant has lost his sanity, cannot, with any appropriate regard for society and for the judicial process, call for the delays in execution incident to full judicial inquiry. And a court can just as satisfac-

[11] See *Edison Co.* v. *Labor Board,* 305 U. S. 197, 234; *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 152–153.

torily determine by mandamus as by direct application whether there are good reasons to have a full-fledged judicial inquiry into a defendant's sanity.

In this situation we find no federal constitutional question presented which is ripe for decision here. So here, as in *Woods* v. *Nierstheimer, supra,* being unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground, the writ of certiorari is

Dismissed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join, concurring.

Where life is at stake one cannot be too careful. I's had better be dotted and t's crossed. And so I deem it proper to state my understanding of the opinion of the Court, on the basis of which I concur in it.

We granted certiorari to review a decision of the Supreme Court of California which dismissed *habeas corpus* proceedings brought in that court. We did so on the assumption that the case raised questions under the Fourteenth Amendment—more particularly, whether an unreviewable determination by the superintendent of a State hospital, that one convicted of murder and found to have become insane after conviction had been restored to sanity and therefore was subject to execution, was consistent with the due process which the Fourteenth Amendment secures. The Court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure the petitioner's claim could not be passed on by the direct remedy of *habeas corpus,* but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity. In short, the Court dismisses the writ of certiorari because the decision of the court below rests on

a purely State ground in that there is a State remedy available, which has not been pursued, by means of which he can secure the rights he claims under the United States Constitution.

Of course I recognize the weight to be attached to the Attorney General's views regarding the law of California. But the controlling voice on California law is that of the Supreme Court of California. Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that State is what our decision presupposes it to be, namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus. It presupposes that California affords petitioner the means of challenging in a substantial way the *ex parte* finding of the Superintendent of the State Hospital for the Insane and enables him to secure judicial determination of the claims he has made in his petition for *habeas corpus* which, so the Court now holds, is not the proper way to proceed.

Upon this view I concur in the decision and opinion of the Court.

BAY RIDGE OPERATING CO., INC. *v.* AARON ET AL.

NO. 366. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 12, 1948.—Decided June 7, 1948.

A collective bargaining agreement between a longshoremen's union and employers, affecting employment in interstate and foreign commerce, provided for "straight time" hourly rates for work done during certain daytime hours on weekdays and "overtime rates," approximately 150% of "straight time" rates, for work done during all other hours and on Sundays and holidays. It made no provision for a differential in pay for work in excess of 40 hours per week. Longshoremen work irregular hours and frequently work for several different employers during a single week. Respondent longshoremen, some of whom had worked only outside "straight time" periods and had been paid "overtime rates," sued to recover additional overtime compensation allegedly due them under the Fair Labor Standards Act for work in excess of 40 hours per week. *Held:*

1. The "straight time" rate provided for by the agreement does not constitute the "regular rate" which § 7 (a) of the Fair Labor Standards Act requires to be used in computing the statutory minimum payment ("not less than one and one-half times the regular rate") for work in excess of 40 hours. Pp. 459–477.

2. *Walling* v. *Belo Corp.*, 316 U. S. 624, distinguished. Pp. 462–463.

3. Contract declarations, even though the result of collective bargaining, are not conclusive as to what is the "regular rate" within the meaning of § 7 (a). Pp. 463–464.

4. Determination of the "regular rate" for each individual must be drawn from what happens under the employment contract. P. 464.

5. The "regular rate" is to be found by dividing the number of hours worked into the total weekly compensation received, less the amount of any "overtime premium." Pp. 464–465.

6. "Overtime premium," deductible from total compensation received in computing the "regular rate," is any additional sum

*Together with No. 367, *Huron Stevedoring Corp.* v. *Blue et al.*, also on certiorari to the same court.

received by an employee for work because of previous work for a specified number of hours in the workweek or workday, whether the hours are specified by contract or statute. Pp. 450, n. 3, 465–471.

7. Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential rather than an overtime premium, and must enter into the determination of the "regular rate" of pay. The extra pay provided in "overtime" rates under the agreement in this case represents a shift differential and not an overtime premium. Pp. 466–471.

8. The fact that the contract "overtime" rates were designed to concentrate the work of the longshoremen in the straight time hours is irrelevant to the determination of the respondents' "regular rate" of pay. P. 470.

9. The purpose of the overtime compensation requirement of § 7 (a) is not only to spread employment but also to compensate an employee in a specific manner for the strain of working longer than 40 hours. P. 470.

10. It is unnecessary in this case to determine what were respondents' "regular working hours," since regular working hours under a contract, even for an individual, have no significance in determining the rate of pay under the statute. Pp. 471–474.

11. Since the so-called "overtime" rates paid under the contract in this case actually represented a shift differential and had no relation to the number of hours previously worked during the week, their payment did not meet the requirements of § 7 of the Fair Labor Standards Act. Pp. 474–476.

12. Each respondent is entitled to receive compensation for his hours worked in excess of 40 at 1½ times his regular rate, computed as the weighted average of the rates worked during the week. P. 476.

13. In computing the amount to be paid, the employer may credit against the obligation to pay statutory excess compensation the amount already paid to each respondent which is allocable to work in those excess hours. The precise method of computing this credit and finding the exact amount due respondents is left to the District Court on remand. Pp. 476–477.

14. On remand, the District Court may consider any defense which the employers may have under the Portal-to-Portal Act, and may allow any amendments to the complaint or answer or any further evidence which the court may deem just. P. 477.

162 F. 2d 665, modified and affirmed.

Respondents sued petitioners to recover unpaid overtime compensation allegedly due under the Fair Labor Standards Act. To the extent that the judgment of the District Court was adverse, 69 F. Supp. 956, respondents appealed and the Circuit Court of Appeals reversed. 162 F. 2d 665. This Court granted certiorari. 332 U. S. 814. *Modified and affirmed,* p. 477.

Assistant to the Attorney General Ford and *Marvin C. Taylor* argued the cause for petitioners. With them on the brief were *Solicitor General Perlman, Herbert A. Bergson, Paul A. Sweeney* and *Harry I. Rand.*

Monroe Goldwater argued the cause for respondents. With him on the brief were *Max R. Simon* and *James L. Goldwater.*

Nathan Baker filed a brief for Frank Adams, as *amicus curiae,* urging affirmance.

Briefs of *amici curiae* urging reversal were filed by *Raymond S. Smethurst* and *Lambert H. Miller* for the National Association of Manufacturers; *Louis Waldman* for the International Longshoremens Association; and *Gregory A. Harrison, William Radner* and *Mary L. Schleifer* for the Waterfront Employers Association.

Mr. Justice Reed delivered the opinion of the Court.

These cases present another aspect of the perplexing problem of what constitutes the regular rate of pay which the Fair Labor Standards Act requires to be used in computing the proper payment for work in excess of forty hours. The applicable provisions read as follows:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his

> employees who is engaged in commerce or in the production of goods for commerce—
>
> . . . . .
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." [1]

The problem posed is the method of computing the regular rate of pay for longshoremen who work in foreign and interstate commerce varying and irregular hours throughout the workweek under a collective bargaining agreement for handling cargo which provides contract straight time hourly rates for work done within a prescribed 44-hour time schedule and contract overtime rates for all work done outside the straight time hours.[2]

These two suits were brought as class actions on behalf of all longshoremen employed by two stevedoring companies, Bay Ridge Operating Co., and Huron Stevedoring

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[1] 52 Stat. 1060, 1063, approved June 25, 1938; § 7 (a) took effect 120 days later, § 7 (d). No problem as to the length of time any employee worked is presented. See *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590; *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680. Portal-to-Portal Act of 1947, 61 Stat. 84.

[2] The use of the word "overtime" in the contract does not decide this case. The problem for solution is whether rates described as "overtime" by the contract actually are such rates as § 7 (a) provides for statutory excess hours.

As will hereafter appear, we consider the contract as intending to provide statutory excess compensation and overtime premium. Consequently, we accept the word "overtime" used in the contract to describe one wage scale as having been intended by the parties to the contract to satisfy fully the requirements of § 7 (a).

Corp., to recover unpaid statutory excess compensation [3] in accordance with § 16 (b) of the Fair Labor Standards Act.[4] By stipulation the claims of ten specific longshoremen in each case were severed and the two suits were consolidated for trial, leaving the claims of the other plaintiffs pending on the docket. The claims of the plaintiffs here are for the period October 1, 1943, to September 30, 1945.

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[3] The following phrases are used in this opinion with the following meaning. These definitions do not apply to quotations.

Extra pay.—Any increased differential from a lower pay scale for work after a certain number of hours in a workday or workweek or for work at specified hours.

Overtime premium.—Extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.

Statutory excess compensation.—Additional compensation required to be paid by § 7 (a), F. L. S. A.

Regular rate of pay.—Total compensation for hours worked during any workweek less overtime premium divided by total number of hours worked.

The following definitions apply to the circumstances of this contract only:

Contract straight time.—Compensation paid under the longshoring contract for work during the hours defined in par. 3 (a) of the contract, as follows: 8 a. m. to 12 noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday.

Contract overtime.—Additional compensation which the contract requires shall be paid for work on legal holidays and for work at hours other than those specified in par. 3 (a).

[4] 52 Stat. 1069, § 16:

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The terms of employment for the respondents, longshoremen working in the Port of New York, were fixed for the period in question by the collective bargaining agreement between the International Longshoremens Association and the New York Shipping Association together with certain steamship and stevedore companies. It was applicable to the two petitioners. The agreement established a "basic working day" of eight hours and a "basic working week," that is, workweek, of forty-four hours; hourly rates for different types of cargo were specified for work between 8 a. m. and 12 noon and between 1 p. m. and 5 p. m. during five working days of the week, Monday through Friday, and from 8 a. m. to 12 noon on Saturday, and a different schedule of rates for work during all other hours in the workweek. The first schedule was called "straight time" rates, and the second schedule was entitled "overtime" rates. This opinion designates these rates as contract straight time and contract overtime. For four types of cargo the overtime rates were exactly one and a half times the straight time rates; for four other types the overtime rates were slightly less than one and a half times the straight time rates. The contract straight time rates ranged from $1.25 to $2.50 an hour. The contract overtime rates were paid for all work on Sundays and legal holidays. The contract provided for no differential for work in excess of forty hours in a week.[5]

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[5] The Agreement contains the following provisions with respect to the hours of work and scale of wages:

I. General Cargo Agreement.

"1. Members of the party of the second part shall have all of the work pertaining to the rigging up of ships and the coaling of same, and the discharging and loading of all cargoes including mail, ships' stores and baggage. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satis-

Respondents claim that their regular rate of pay under the contract for any workweek, within the meaning of

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factory manner, then the party of the first part may employ such other men as are available.

"2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

"(b) Meal hours shall be from 6 A. M. to 7 A. M., from 12 Noon to 1 P. M., from 6 P. M. to 7 P. M., and from 12 Midnight to 1 A. M..

. . . . .

"(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority.

. . . . .

"3. (a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M., Monday to Friday, inclusive, and from 8 A. M. to 12 Noon Saturday.

"(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

"(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved.

"4. Wage Scale: The wage scale shall be as follows:

	Straight Time Hourly Rate	*Overtime Hourly Rate*
"(a) General Cargo of every description, including barrel oil when part of General Cargo, and all General Cargo handled in refrigerator space with the temperature above freezing	$1.25	$1.87½"
Extra rates are paid for special types of cargo. For example:		
"(d) Wet hides, creosoted poles, creosoted ties, creosoted shingles and soda ash in bags...	$1.40	$2.02½"

§ 7 (a), is the average hourly rate computed by dividing the total number of hours worked in any workweek for any single employer into the total compensation received from that employer during that week; and that in those workweeks in which they worked more than forty hours for any one employer they were entitled by § 7 (a) to statutory excess compensation for all such excess hours computed on the basis of that rate. The petitioners claim that the straight time rates are the regular rates, and that they have, therefore, with minor exceptions not presented by this review, complied with the requirements of § 7 (a). That is, no rates except straight time rates are to be taken into consideration in computing the regular rate. The petitioners contend that the contract overtime rates were intended to cover any earned statutory excess compensation and did cover it because they were substantially in an amount of one and one-half times the straight time rates. The District Court held that the contract straight time rates were the regular rates but the Circuit Court of Appeals for the Second Circuit held otherwise.[6]

Throughout all these proceedings the petitioners have been represented by the Department of Justice, since the United States under its cost-plus contracts with the petitioners is the real party in interest. Substantially all stevedoring during the war years was performed for the account of the United States. The Solicitor General notes that prior to the decision in the Circuit Court of Appeals, 118 suits had been instituted on behalf of longshoremen, and since that time approximately 100 new complaints have been filed. Contracts of the same general type are said to have been in effect in all our maritime areas. Witnesses testifying before the Wages and Hours

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[6] *Addison* v. *Huron Stevedoring Corp.*, 69 F. Supp. 956; *Aaron* v. *Bay Ridge Operating Co.*, 162 F. 2d 665.

Subcommittee of the House Committee on Education and Labor stated that liability of the Government under such suits would be large.[7] The Wage and Hour Administrator has not filed a brief in the proceedings, but the Solicitor General has advised us that the Administrator of the Wage and Hour Division of the Department of Labor "believes that proper consideration was given by the court below to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct." The Administrator and the Solicitor of the Department of Labor testified at length before the House committee as to their views on the issues presented by these cases.[8] *Amicus* briefs have been filed by the International Longshoremens Association, the National Association of Manufacturers, and the Waterfront Employers

[7] Mr. Walter E. Maloney, representing the National Federation of American Shipping, testified that liability to the Government on stevedoring contracts might run as high as $260,000,000, although he admitted that the amount of liability was "almost impossible to calculate." Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 1198–1205. Committee members referred to the amounts in question as $236,000,000, $340,000,000, and $300,000,000. Hearings, *supra,* pp. 1203, 2283, 2469. The basis for such figures does not appear. Nor is it made clear whether the Portal-to-Portal Act was in mind. 61 Stat. 84, 88, 89, Pt. IV, §§ 9 and 11.

The International Longshoremens Association claims to have approximately 80,000 members in United States and Canada. Thirty thousand are said to work in the Port of New York, and the terms adopted in the New York contract are generally followed in other ports. The Waterfront Employers Association of the Pacific Coast states that 20,000 stevedores are covered by 21 collective bargaining contracts, of which 3 are with the International Longshoremen's and Warehousemen's Union. The current New York contract with the I. L. A. and the 21 agreements between the Pacific Association and the I. L. A. and I. L. W. U. are said to contain clauses permitting cancellation if the courts sustain the claims of plaintiffs in this suit.

[8] Hearings, *supra,* note 7, 2467–2471; 2474–2482; 2736–2762.

Association of the Pacific Coast, all urging that the decision below be reversed.

In order to fix the legal issues in their factual setting, we summarize the findings of fact made by the District Court which were accepted by the Circuit Court of Appeals and are not challenged here. Most of these findings referred to in this opinion will be found in the Appendix at 162 F. 2d 670. Employment in the longshore industry has always been casual in nature. The amount of work available depends on the number of ships in port and their length of stay and is consequently highly variable and unpredictable, from day to day, week to week, and season to season. Longshoremen are hired for a specific job at the "shape," [9] which is normally held three times a day at each pier where work is available. The hiring stevedore selects the men he desires from the longshoremen who are present at the "shape"; in some instances a group of longshoremen are hired together as a gang. The work may last only for a few hours or for as long as a week. Although some work is carried on at all hours, the stevedoring companies, since operations are then carried on at less cost, attempt to do as much work as possible during the straight time hours.

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[9] The trial court gave the following explanation of the "shape," Finding 16:

"At three stated hours during the day, namely at 7.55 a. m., 12.55 p. m. and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the 'shape,' at the head of a pier where work is available. The foreman stevedore then selects from the 'shape' such men as he desires to hire, to work until 'knocked off,' that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company."

The court further found that the rate for night work and holiday work had been higher than the rate for day work since at least as far back as 1887, and that since 1916, when the first agreement was made with the International Longshoremens Association, the differential had been approximately 50%. Joseph B. Ryan, President of the Association, testified that the differential was designed to shorten the total number of hours worked and to confine the work as far as possible within the scheduled forty-four hours. Despite the differential, many longshoremen were unwilling to work at night. Although some longshore work was required at all hours, except Saturday night, the District Court found that the differential had been responsible for the high degree of concentration of longshore work to the contract straight time hours.

The government introduced elaborate statistical studies to show the distribution of work as between the contract straight time and contract overtime hours. From 1932 to 1937, 80% of the total hours worked were within the contract straight time hours and only 2½% of the total manhours were performed by men working between 5 p. m. and 8 a. m. (exclusive of Sundays and holidays) who had worked no straight time hours earlier that day. During the war, the proportion of work in contract overtime hours was considerably higher because of the greater volume of cargo handled; 55% of the total hours fell within the contract straight time hours, and the ratio of work in contract overtime hours by men who had not previously worked in the contract straight time hours was correspondingly higher. The respondents' employment was highly irregular; in many weeks the respondents did not work at all, and in weeks in which they did work their hours of employment varied over a wide range. The trial court concluded that

the "basic working day" and "basic working week," [10] meaning by these phrases the contract straight time hours, were not the periods "normally, regularly or usually" worked by the respondents. Finding 45.

In giving judgment for the petitioners, the trial court placed emphasis on the fact that the rates in question were arrived at through bona fide collective bargaining, and were more favorable to the longshoremen than the statutory mandate required. That is, that rates as high as contract straight time rates plus statutory excess compensation were paid to all workers for all work in contract overtime hours whether required by § 7 (a) or not. The District Court opinion referred to Joseph B. Ryan's statement that the International Longshoremens Association was opposed to the suit "as it might wipe out all of the gains we had made for our men over a period of 25 years." [11] It rejected respondents' alternative contentions

[10] The trial court found, Finding 13, that "The work week commenced on Monday at 7 a. m., and ended the following Monday at 7 a. m." The 44-hour week had been in the contracts between the Shipping Association and the Longshoremens Association prior to the Fair Labor Standards Act. No adjustment of the basic workweek was made in the contract when the 42- and 40-hour provisions of § 7 (a) became effective.

[11] Mr. Ryan explained the Association objective as follows: "Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. Before there was any union we had double time for Sunday. We wanted to work in the daytime. We figured we only live once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it in any other way, have been done.

"Q. Do the men object to working outside of a normal day? A. Absolutely."

Furthermore, as the Longshoremens Association's primary interest

that the regular rate was to be determined by the average rate during the first forty hours or by the average rate for all hours worked. It noted that shift differentials were usually five or ten cents an hour and seldom exceeded fifteen cents and were not designed to deter the employer from working employees during the period for which the differential was paid; in the present case the trial judge found that the 50% differential was designed to deter and actually did deter work outside contract straight time hours. Accordingly the trial court concluded that the "collectively bargained agreement established a regular rate" under the Fair Labor Standards Act—the contract straight time rate. 69 F. Supp. 956, 961.

The Circuit Court of Appeals held that the regular rate must be determined as an "actual fact" and could not be arranged through a collective bargaining agreement, citing *149 Madison Ave. Corp.* v. *Asselta,* 331 U. S. 199. That court therefore concluded that on the basis of the findings below the regular rate must be computed by dividing the total number of hours worked into the total compensation received. The court rejected the contention that the regular rate was the average rate for the first forty hours of work, citing *Walling* v. *Halliburton Oil Well Cementing Co.,* 331 U. S. 17. The judgment of the District Court was reversed with directions to determine the amounts due plaintiffs in the light of the Portal-to-Portal Act of 1947, 61 Stat. 84. No determination of the scope or validity of that act was attempted as those matters had not been argued. 162 F. 2d 665, 673.

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is as stated above by Mr. Ryan, it fears the effect on their employment contract of a holding that the contract overtime rate must be used in the determination of statutory excess compensation. The Shipping Association might insist on a reduction of the contract overtime rate, if payment of that rate were not to be treated as a satisfaction of the statutory requirements.

On account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay, we granted certiorari.[12] 332 U. S. 814.

The government adopts the view of the District Court that the contract straight time rates constituted the regular rates within the meaning of § 7 (a) of the Fair Labor Standards Act. The government accepts, too, the reasoning of the District Court that the contract overtime rates, as they were coercive in the sense that they were intended to exert pressure on employers to carry on their activities in the straight time hours, were not regular rates and could be credited against required statutory excess compensation in the amount that the contract overtime rates exceeded the contract straight time rates. The government argues in the alternative that the "normal, non-overtime workweek," said to be the hours controlling the regular rate of pay, is to be determined by reference to peacetime conditions, rather than the abnormal wartime conditions, and that the statistical studies show that the work of longshoremen is sufficiently concentrated within the scheduled hours to compel the finding that the contract straight time hours are the regular working hours. The government urges also that the contract, as thus interpreted, accords with congressional purposes in enacting the Fair Labor Standards Act. It is said to reduce working hours and spread employment and to preserve the integrity of collective bargaining.

We agree with the conclusion reached by the Circuit Court of Appeals. Later in this opinion, pp. 465–471, we set out our reasons for concluding that the extra pay for contract overtime hours is not an overtime premium. Where there are no overtime premium payments the rule

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[12] See note 7, *supra*.

for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek and adjudge additional payment to each individual on that basis for time in excess of forty hours worked for a single employer. Any statutory excess compensation so found is of course subject to enlargement under the provisions of § 16 (b). Compare § 11 of Portal-to-Portal Act of 1947. This determination, we think, accords with the statute and the terms of the contract.

(1) The statute, § 7 (a), expresses the intention of Congress "to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum." The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost.[13] The statute by its terms protects the group of employees by protecting each individual employee from overly long hours. So although only one of a thousand works more than forty hours, that one is entitled to statutory excess compensation. That excess compensation is fixed by § 7 (a) "at one and one-half times the regular rate at which he is employed." The regular rate of pay of the respondents under this contract must therefore be found.

The statute contains no definition of regular rate of pay and no rule for its determination. Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week, month or year, and with or without a guarantee that earnings for a period of time shall be at least a stated sum. The regular rate may vary from week to week. *Overnight Motor Co.* v. *Missel,*

[13] *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577, 578; *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 40; *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, 706; *Jewell Ridge Corp.* v. *Local,* 325 U. S. 161, 167.

316 U. S. 572, 580; *Walling* v. *Belo Corp.*, 316 U. S. 624, 632. The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted. As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency.[14]

Every contract of employment, written or oral, explicitly or implicitly includes a regular rate of pay for the person employed. *Walling* v. *Belo Corp., supra,* 631; *Walling* v. *Halliburton Oil Well Cementing Co., supra.* We have said that "the words 'regular rate' . . . obviously mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 40. See *United States* v. *Rosenwasser,* 323 U. S. 360, 363. "Wage divided by hours equals regular rate." *Overnight Motor Co.* v. *Missel, supra,* 580. "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 424–25. The result is an "actual fact." *149 Madison Ave. Corp.* v. *Asselta, supra,* 204.

In dealing with such a complex situation as wages throughout national industry, Congress necessarily had to

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[14] *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523; see § 9, Part IV, Portal-to-Portal Act, 61 Stat. 84, 88.

rely upon judicial or administrative application of its standards in applying sanctions to individual situations. These standards had to be expressed in words of generality. The possible contract variations were unforeseeable. In *Walling* v. *Belo Corp., supra,* 634, this Court refrained from rigidly defining "regular rate" in a guaranteed weekly wage contract that met the statutory requirements of § 7 (a) for minimum compensation. In the *Belo* case the contract called for a regular or basic rate of pay above the statutory minimum and a guaranteed weekly wage of 60 times that amount. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after 54½ hours were worked. P. 628. We refused to require division of the weekly wage actually paid by the hours actually worked to find the "regular rate" of pay and left its determination to agreement of the parties. Where the same type of guaranteed weekly wages were involved, we have reaffirmed that decision as a narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced. *Walling* v. *Halliburton Co., supra.* Aside from this limitation of *Belo,* the case itself is not a precedent for these cases as in *Belo* the statutory requirements of minimum wages and statutory excess compensation were provided by the Belo contract. In these present cases no provision has been made for any statutory excess compensation and none can be earned by any respondent based on the contract overtime pay. Our assent to the *Belo* decision, moreover, does not imply that mere words in a contract can fix the regular rate.[15] That

[15] *149 Madison Ave. Corp.* v. *Asselta, supra,* p. 204: "The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the 'regular rate' of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation." *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427, 432.

would not be the maintenance of a flexible definition of regular rate but a refusal to apply a statutory requirement for protecting workers against excessive hours. The results on the individual of the operations under the contract must be tested by the statute.[16] As Congress left the regular rate of pay undefined, we feel sure the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay.

Further, we reject the argument that under the statute an agreement reached or administered through collective bargaining is more persuasive in defining regular rate than individual contracts. Although our public policy recognizes the effectiveness of collective bargaining and encourages its use,[17] nothing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining. *149 Madison Ave. Corp.* v. *Asselta, supra,* 202 and 204; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427, 432.[18] A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agree-

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[16] *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* 424; *Walling* v. *Harnischfeger Corp., supra,* 430.

[17] National Labor Relations Act, 49 Stat. 449; Labor Management Relations Act of 1947, 61 Stat. 136; Norris-LaGuardia Act, 47 Stat. 70, § 2; Portal-to-Portal Act of 1947, 61 Stat. 84, § 1.

[18] The contention, however, found favor with the District Court: "Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live." 69 F. Supp. 956, 959.

ment should be effective in determining the regular rate of pay [19] but we think the words of and practices under the contract are the determinative factors in finding the regular rate for each individual.

As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract. We think the most reasonable conclusion is that Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that represents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division. This deduction of overtime premium from the pay for the workweek results from the language of the statute. When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended. In order to avoid a similar double payment, we think that any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay

[19] "Collective bargaining, to be effective, must necessarily deal with large groups—with all the workers in the industry, or its subdivision, on whose behalf the bargaining is being conducted. And when, as in the I. L. A., such collective agreements are submitted to a vote of the membership affected, and that approval of the bargain thus arrived at is voted, it would make of collective bargaining a mockery if some of them could seek special terms, because, for a short period of time, their work experience has varied in some degree from that of their fellow workers."

statutory excess compensation. These conclusions accord with those of the Administrator.[20]

The definition of overtime premium thus becomes crucial in determining the regular rate of pay. We need not pause to differentiate the situations that have been described by the word "overtime." [21] Sometimes it is used to denote work after regular hours, sometimes work after hours fixed by contract at less than the statutory maximum hours and sometimes hours outside of a specified clock pattern without regard to whether previous work has been done, *e. g.*, work on Sundays or holidays. It is not a word of art. See Premium Pay Provisions in Selected Union Agreements, Monthly Labor Review, U. S. Department of Labor, October 1947, Vol. 65, No. 4. Overtime premium has been used in this opinion as defined in note 3. It is that extra pay for work because of previous work for a specified number of hours in the workweek or workday. It is extra pay of that kind which we think that Congress intended should be excluded from computation of regular pay. Otherwise the purpose of the statute to require payment to an employee for excess hours is expanded extravagantly by computing regular rate of pay upon a payment already made for the same purpose for which § 7(a) requires extra pay, to wit, extra pay because of excess working hours. Accordingly, statutory excess compensation paid for work in excess of forty hours should not be used to figure the regular rate. Neither should similar contract excess compensation for work

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[20] See note 30 and *Walling* v. *Youngerman-Reynolds Hardwood Co., supra*, 424–25.

[21] Cf. Finding 28 (a): "Prior to the Fair Labor Standards Act, the word overtime had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern."

because of prior work be used in such a calculation. Extra pay by contract because of longer hours than the standard fixed by the contract for the day or week has the same purpose as statutory excess compensation and must likewise be excluded.[22] Under the definition, a mere higher rate paid as a job differential or as a shift differential, or for Sunday or holiday work, is not an overtime premium. It is immaterial in determining the character of the extra pay that an employee actually has worked at a lower rate earlier in the workweek prior to the receipt of the higher rate. The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium.

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[22] The holding in *Walling* v. *Helmerich & Payne, supra,* is not to the contrary of this position. The facts of that case indicated a palpable evasion of the statutory purposes. See 69 F. Supp. at p. 958, note 1.

Nor is the decision in *149 Madison Ave. Corp.* v. *Asselta, supra,* opposed to this position. In that case weekly wage contracts calling for a workweek of 46 and 54 hours provided the following formula for determining the regular hourly rate of pay: " 'The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours.' " 331 U. S. at 202. Under that method of computation an employee who worked 46 hours received a sum equal to what he would have received if he had been paid for 40 hours' work at the formula hourly rate and 6 hours of work at one and a half times the formula rate. As so construed, the extra pay for work in excess of 40 hours would be an overtime premium which could be excluded from the computation of the regular rate, and the regular rate would be the formula rate. The Court did not reach the question of the legality of that method of computation as it held that since the formula rate was not consistently employed in determining compensation, the formula rate could not be considered the regular rate for those who worked more than 40 hours. Accordingly the regular rate was held to be the average of all wages actually paid during the entire week. See *Asselta* v. *149 Madison Ave. Corp.*, 156 F. 2d 139, 141.

The trial court refused to accept the respondents' contention that the contract overtime rate was a shift differential, partly because it was felt that such a holding would have a disruptive effect on national economy. 69 F. Supp. 958–59. We use as examples three illustrations employed by the District Court to illustrate its understanding of the effect of respondents' contentions to employment situations. That court thought these illustrations indicated additional liability from the employer under § 7 (a).[23] We do not agree. Our conclusions as to the trial court's illustrations vary from those of the trial court because that court did not deduct overtime premiums, as we have defined them, actually paid from the weekly wage before dividing by the hours worked. See quotation from *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* at p. 461 of this opinion. (1) The employment contract calls for an overtime premium for work beyond thirty-six hours. Such extra pay should not be included as weekly wages in any computation of the regular rate at which a man works.[24] (2) A contract

[23] The opinion stated:

"This controversy requires for its resolution a delicate adjustment to accommodate the harmonious application of three national policies. A heavy handed meshing of these three policies with the industrial machine which fails to minimize the friction at their points of contact can generate enough heat to impair one or more of the policies or severely injure the machine itself.

"In chronological order we have (1) the National Labor Relations Act, July 5, 1935, 49 Stat. 449, . . . to encourage the practice of collective bargaining; (2) the Fair Labor Standards Act, June 25, 1938, 52 Stat. 1060, . . . to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers; (3) the national need during the war for the maximum of production as illustrated by Executive Order 9301, February 9, 1943, 8 Fed. Reg. 1825, establishing the 48 hour week for the duration of the war." 69 F. Supp. 956, 958.

[24] 36 hours×$1+14 hours×$1.50=total wages $57. Regular rate=$57, less overtime premium of $7, ÷50 hours=$1 per hour.

provides for payment of time and a half for work in excess of eight hours in a single workday. An employee who works five ten-hour days would have no claim for statutory excess compensation if paid the amount due by the contract.[25] Or (3) a contract provides for a rate of $1 an hour for the first 40 hours and $1.50 for all excess hours; an employee works 48 hours and receives $52. To find his regular rate of pay, the overtime premium of $4 should be deducted and the resulting sum divided by 48 hours.[26] On the other hand, a man might be employed as a night watchman on an eight-hour shift at time and a half the wage rate of day watchmen. This would be extra pay for undesirable hours. It is a shift differential. It would not be overtime premium pay but would be included in the computation for determining overtime premium for any excess hours.[27]

Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such

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[25] 5 days×8 hours at $1 per hour+5 days×2 hours at $1.50 per hour=$55 total wage. Regular rate=$55−$5 ÷50=$1 per hour.

[26] Executive Order 9301, issued February 9, 1943, 8 Fed. Reg. 1825, provided that all government contractors should work their employees at least 48 hours per week. The Order provided that it should not be construed as superseding the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor as suspending or modifying any provision of the Fair Labor Standards Act or any other law relating to the payment of wages or overtime.

[27] For example, daytime watchman's pay, $.60 per hour. Nighttime watchman's pay $.90 per hour, eight-hour, seven-day shift. Sixteen hours would be compensated for at excess time rates. The watchman's pay would be 56×$.90=$50.40. His statutory excess pay 16×$.45=$7.20; total $57.60. His regular rate is ($57.60−$7.20)÷56 or $.90 per hour.

Compare Legal Field Letter 109, Office of the Solicitor, Department of Labor, July 31, 1946, 1947 Wage-Hour Man. 66, in which the Chief of the Wage-Hour Section characterizes a particular 50% differential as a shift differential.

wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium.[28] Such payments enter into the determination of the regular rate of pay. See *Cabunac* v. *National Terminals Corp.*, 139 F. 2d 853.

The trial court seemed to assume that if the contract overtime rate were a shift differential, the employee who worked on a higher paid shift would be entitled to have his higher shift rates enter into the computation of regular rate of pay. One of the reasons for not allowing the contract overtime rates in the computation of regular rate of pay was that it thought the great difference between the contract straight time and contract overtime rates showed that the premium paid by contract was not a shift differential but a true overtime premium. In this we think the trial court erred. The size of the shift differential cannot change the fact that large wages were paid for work in undesirable hours. It is like a differential for dangerous work. This contract called for $2.50 straight time hourly rate for handling explosives. The statutory excess compensation would, of course, be $3.75 per hour. If an employee receives from his employer a

[28] This is well brought out by a case similar in character to this litigation. *Ferrer* v. *Waterman S. S. Corp.*, 70 F. Supp. 1. There the wage schedule was as follows, p. 3:

GENERAL CARGO

From	*To*	*Work Days*	*Holidays*
7 A. M.	12 M. D.	$0.55	$0.77
12 M. D.	1 P. M.	0.90	1.00
1 P. M.	4 P. M.	0.55	0.77
4 P. M.	6 P. M.	0.77	0.84
6 P. M.	7 P. M.	0.90	1.20
7 P. M.	11 P. M.	0.77	0.84
11 P. M.	12 M. N.	0.90	1.25
12 M. N.	6 A. M.	0.84	1.02
6 A. M.	7 A. M.	1.30	1.40

high hourly rate of pay for hard or disagreeable duty, he is entitled to the statutory excess compensation figured on his actual pay.

Nor do we find the District Court's reliance upon the fact that the overtime rates were employed in order to concentrate the work of the longshoremen in the straight time hours relevant to a determination of the respondents' rate of pay. The District Court thought the concentration was significant. It did not test whether the contract overtime rates contained overtime premium payments by considering whether the employee actually received extra compensation for excess hours. We accept the District Court's holding that this concentration was an intended effect of the overtime rates and that the higher rates did contribute to the concentration of the work in the straight time hours as set out in a preceding paragraph of this opinion. P. 456 *supra.* Such a concentration tends, in some respects, to the employment of more men, as there is pressure for more work to be done in the straight time hours. *Overnight Motor Co.* v. *Missel, supra,* 578. However, the pressure of the contract overtime wages is not solely toward a spread of employment. Since work is in fact done outside straight time hours, the employer can use men who have previously worked in straight time hours in contract overtime hours without additional cost.

But spread of employment is not the sole purpose of the forty-hour maximum provision of § 7 (a). Its purpose is also to compensate an employee in a specific manner for the strain of working longer than forty hours. *Overnight Motor Co.* v. *Missel, supra,* 578. The statute commands that an employee receive time and one-half his regular rate of pay for statutory excess compensation. The contract here in question fails to give that compensation to an employee who works all or part of his time in the less desirable contract overtime hours. Looked at

from the individual standpoint of respondents, the concentration of work does not have any effect upon their regular rate of pay. Because of this defect, the concentration of work brought about by the contract has no effect in the determination of the regular rate of pay. As we indicated at the beginning of this subdivision (1), a major purpose of the statute was to compensate an employee by extra pay for work done in excess of the statutory maximum hours. Thus the burdens of overly long hours are balanced by the pay of time and a half for the excess hours.

We therefore hold that overtime premium, deductible from extra pay to find the regular rate of pay, is any additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.[29]

(2) Since under Interpretative Bulletin No. 4, § 69, the Administrator refers to regular working hours as important in calculating the regular rate of pay under

[29] We avoid any extended discussion of respondents' suggestion that the proper way to determine the regular rate is to divide the wages received during the first forty hours of work in a week by 40. The quotient, it is suggested, would be the regular rate. One fault of that method, we think, is that such wages might contain overtime premium payments; for example, a contract which fixed a rate for 36 hours and a higher rate for subsequent hours. Another objection is that such a method of computation would give an improperly weighted average for the rate of pay for the entire week; an employee who performed more highly skilled or unpleasant work after 40 hours of work would not receive the proper amount of statutory excess compensation if the regular rate were computed only on the basis of the first 40 hours. The statement as to statutory excess hours in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 423, was made as to a situation where this Court concluded the dual pay plan of the case was "wholly unrealistic and artificial . . . so as to negate the statutory purposes." 323 U. S. 42. The problem we are here considering was not at issue.

§ 7 (a) of the Act, a word must be said as to regular working hours in this case.[30] "Regular working hours" apparently has not been defined by the Administrator. He could hardly have intended in § 69 to employ the statutory maximum hours as synonomous with regular working hours as there is no prohibition on regular working hours that are longer than the statutory maximum. His illustrations, numbers 2 and 3, show that overtime premiums may be earned within the first 40 hours of a workweek. The statutory maximum hours are significant only as requiring overtime premium pay. An employer may increase pay or decrease hours free as to those steps from statutory regulation. See article in Monthly Labor Review, *supra*. The trial court pointed out that "The identifying mark of the case at bar is the absence of any norm, any regularity. Both parties have emphasized the casual, irregular character of the employment." 69 F. Supp. 959–60. The trial court, as we have heretofore stated, pp. 456–457, also found that the "basic working day," defined by § 2 (a) of the agreement set forth in note 5, *supra*, was not the day normally, regularly or usually worked by respondents. Indeed the contract, § 1, required these round-the-clock irregular hours from some

[30] The question is sufficiently shown by this excerpt: "Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as *compensation for overtime work—that is, for hours worked outside the normal or regular working hours*—regardless of whether he is required to pay such compensation by a union or other agreement." Interpretative Bulletin No. 4, United States Department of Labor, Wage and Hour Division, Office of the Administrator, revised November 1940.

individuals. We call attention to the problem only to lay it aside as inapplicable in this case.

However, the government contends in this case that regular working hours are important, that the contract fixed regular working hours as the straight time hours and that as an actual fact as shown by the statistics of concentration of work in straight time hours, p. 456, *supra,* the straight time hours were the regular working hours of all longshoremen. The government concludes from this that the contract straight time pay is the regular rate of pay and the contract overtime pay includes a true overtime premium. We may be mistaken in thus limiting the government's argument on this point. If the government means that any extra pay to an employee for work outside regular working hours of the group of employees is to be excluded from the computation of the regular rate, we do not think that contention sound. The defect in this argument, however the government's position is construed, is that it treats of the entire group of longshoremen instead of the individual workmen, respondents here. The straight time hours can be the regular working hours only to those who work in those hours. The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual. As a matter of fact, regular working hours under a contract, even for an individual, has no significance in determining the rate of pay under the statute. It is not important whether pay is earned for work outside of regular working hours. The time when work is done does not control whether or not all or a part of the pay for that work is to be considered as a part of the regular pay.

We think, therefore, that this case presents no problems that involve determination of the regular hours of work. As an employment contract for irregular hours

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the rule of dividing the weekly wage by the number of hours worked to find the regular rate of pay would apply. Cf. *Overnight Motor Co.* v. *Missel, supra,* at 580.

(3) The contract was interpreted by the Shipping Association and the Longshoremens Association as providing that the contract straight time was the regular rate. The parties to the contract indicated by their conduct that the contract overtime was the statutory excess compensation or an overtime premium. Finding 43, 162 F. 2d at 672; see note 33, *infra.*[31] Apparently no dispute or controversy arose over this interpretation although the contract, § 19, made provision for the resolution of such disagreements. The trial court determined that the straight time hourly rate was the regular rate at which respondents were employed.[32] This construction by the parties and the court's conclusion, supported by evidence, leads us to consider this agreement as though there was a paragraph which read to the effect that the straight time rate is the regular rate of pay. We should also consider that the contract provided that the contract overtime rates were intended to provide any statutory excess compensation, when men worked more than forty hours except in those situations where the entire time, including the excess, was in the straight time hours.[33] This of course

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[31] As a matter of fact, in half of the cargo classifications the overtime rate was a few cents less per hour than time and a half the straight time rates.

[32] Conclusion of Law No. 3: "The 'straight time hourly rate' set forth in each subdivision of Paragraph 4 of the Collective Agreement, as stated in Finding of Fact No. 9, constituted the regular rate at which plaintiffs were employed when handling the stated kind of cargo."

[33] It is clear under the applicable section of the agreement, § 2 (a), note 5 above, that a man could work all his time wholly in contract overtime hours. An employee received overtime premium for work done in what the trial court considered to be the basic workweek. Finding 43 (a): "If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and

does not mean that respondents here were familiar with these purposes of the agreement. So far as the record shows, they worked for the pay promised under the words of the contract. It shows nothing more on this point.

Under the contract we are examining, the respondents' work in overtime hours was performed without any relation as to whether they had or had not worked before. Under our view of § 7 (a)'s requirements their high pay was not because they had previously worked but because of the disagreeable hours they were called to labor or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible. As heretofore pointed out, we need not determine what were the regular working hours of these respondents. If it were important, the trial court determined that their regular working hours were not the straight time hours. They worked at irregular times. Finding 45, 162 F. 2d at 673. The record shows that all respondents worked 5,201 straight time hours and 20,771 overtime hours. Four of the twenty respondents worked no straight time hours. Five others worked less than 100 straight time hours. Three worked more straight time than overtime. The record does not show the hours these respondents worked for other employers. That fact is immaterial in this case as respondents seek recovery only from petitioner employers. These round-the-clock hours were in strict accordance with the contract which allowed the Longshoremens Association to furnish all men needed and called for the men to "work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required." §§ 1 and 2; see note 5. Men who worked contract overtime hours were entitled to contract overtime pay. They were given no overtime premium pay because

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5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, . . ."

of long hours. It is immaterial that his regular rate may greatly exceed the statutory minimum rate. This contract overtime rate, therefore, did not meet the excess pay requirements of § 7.

In finding the statutory excess compensation due respondents, the trial court must determine the method of computation. Each respondent is entitled to receive compensation for his hours worked in excess of forty at one and a half times his regular rate, computed as the weighted average of the rates worked during the week. In computing the amount to be paid, the petitioners may credit against the obligation to pay statutory excess compensation the amount already paid to each respondent which is allocable to work in those excess hours. The precise method for computing this credit presents the difficulty. According to the Administrator's interpretation, an employer may credit himself with an amount equal to the number of hours worked in excess of forty multiplied by the regular rate of pay for the entire week rather than an amount equal to the number of hours worked in excess of forty multiplied by the average rate of pay for those excess hours.[34] Under that formula each respond-

[34] See Interpretative Bulletin No. 4, § 14. The Administrator illustrates his position with the following example: an employee works 30 hours a week at an occupation paying 40 cents an hour and 20 hours in the same week at an occupation paying 50 cents an hour. The employee's regular rate of pay is 44 cents an hour (30 hours×40 cents+20 hours×50 cents÷50 hours), and he is entitled to receive $2.20 in addition to the $22 he has already received, equal to the number of overtime hours (10) multipled by one-half the regular rate of pay (22 cents).

If it were held that an employer, under the contract we are here considering, could credit himself only with the wages actually paid during the hours following the first 40, an employee who performed 40 hours of contract overtime work early in the week and 10 hours of straight time after the first 40 hours would receive a larger award than an employee who first worked 10 straight time hours and then worked 40 contract overtime hours. Such a variation in the

ent is entitled, as statutory excess compensation, to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay. On the record before us, that interpretation seems to be a reasonable one; we leave a final determination of the point to the District Court on further proceedings.

The Circuit Court ordered the case remanded to the District Court for determination of the amounts due respondents in accordance with its opinion. By a further order, it allowed the District Court to consider any matters presented to it by petitioners as a defense in whole or in part under the Portal-to-Portal Act. We modify these orders so as to permit the District Court to allow any amendments to the complaint or answer or any further evidence that the District Court may consider just.

As so modified the judgment of the Circuit Court of Appeals is affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON and MR. JUSTICE BURTON concur, dissenting.

No time is a good time needlessly to sap the principle of collective bargaining or to disturb harmonious and fruitful relations between employers and employees

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amount of statutory excess compensation would not be in accord with the statutory purpose.

Compare, however, Releases 1913 and 1913 (a) issued by the Administrator on December 1, 1942 and January 5, 1943, which provide that an employer may if he so elects compute the regular rate on the basis of the number of hours worked in excess of 40. If that method of computation of the regular rate is followed, an employer could credit himself with the wages actually paid during the hours in excess of 40.

brought about by collective bargaining. The judgment of Congress upon another doctrinaire construction by this Court of the Fair Labor Standards Act ought to admonish against an application of that Act in disregard of industrial realities. Promptly after the Eightieth Congress convened, Congress proceeded to undo the disastrous decisions of this Court in the so-called portal-to-portal cases. Within less than a year of the decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, both Houses, by overwhelming votes that cut across party lines, passed, and the President signed, the Portal-to-Portal Act of 1947. What is most pertinent to the immediate problem before us is the fact that because the Fair Labor Standards Act had been "interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees," Congress had to undo such judicial misconstruction because it found that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created." [1] Because the present decision is heedless of a long-standing and socially desirable collective agreement and is calculated to foster disputes in an industry which has been happily at peace for more than thirty years, I deem it necessary to set forth the grounds of my dissent.

The Court's opinion is written quite in the abstract. It treats the words of the Fair Labor Standards Act as though they were parts of a cross-word puzzle. They are, of course, the means by which Congress sought to eliminate specific industrial abuses. The Court deals with these words of Congress as though they were unrelated to the facts of industrial life, particularly the facts pertaining to the longshoremen's industry in New York. The

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[1] Section 1 (a), Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. § 251 (a).

Court's opinion could equally well have been written had the history of that industry up to 1916 not been an anarchic exploitation of the necessities of casual labor for want of a strong union to secure through equality of bargaining power fair terms of employment. See, *e. g.*, Barnes, The Longshoremen (1915), *passim.* Through such bargaining power the agreement was secured which the Court now upsets. Through this agreement, the rights and duties of the industry—the members of the union on the one hand and the employers on the other hand—were defined, and the interests of the men, the employers, and, not least, the community were to be adjusted in a rational and civilized way. On behalf of a few dissident members of the union, but against the protests of the union and of the employers and of the Government, the Court dislocates this arrangement and it does so by what it conceives to be the compulsions of § 7 (a) of the Fair Labor Standards Act.[2] This is to attribute destructive potency to two simple English words—"regular rate"—far beyond what they deserve.

Employment of longshoremen has traditionally been precarious because dependent on weather, trade conditions, and other unpredictables. Decasualization of their work has been their prime objective for at least sixty years. They have sought to achieve this result by inducing concentration of work during weekday daytime hours.

One of the strongest influences to this end is to make it economically desirable. And so the union has sought and achieved an addition to the basic—the regular—rate sufficiently high to deter employers from assigning work

[2] "No employer shall . . . employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1060, 1063, 29 U. S. C. § 207 (a).

outside of defined periods, except in emergencies. Since 1916, when the International Longshoremens Association made its first collective agreement with waterfront employers in New York, a 50% premium on night and weekend work has generally prevailed. In the industry, this has been colloquially called "overtime" pay.

Longshoremen do not usually work continuously for one employer, but shift from one to another, wherever employment can be found. The Fair Labor Standards Act does not entitle an employee who works a total of over forty hours per week for several employers, but not more than forty hours for any one of them, to any overtime pay. In view of the peculiarities of this industry, therefore, the only effective way of promoting the aim of the Fair Labor Standards Act, to deter a long workweek, is that devised by the collective agreement, namely, to limit to approximately the statutory maximum of hours the total length of the periods in the week for which additional pay amounting to overtime rates need not be paid, regardless of the employer for whom the work is done.

During the period (1943–45) in controversy, the wage rates were governed by the 1943 General Cargo Agreement between the International Longshoremens Association and the employers at the Port of New York. Under its terms, the "basic working week," for which "straight time" hourly rates were paid, included the hours of 8 a. m. to noon, and 1 p. m. to 5 p. m., Monday through Friday, and 8 a. m. to noon on Saturday.[3] "Overtime" rates, for

[3] "2 (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

"(b) Meal hours shall be from 6 a. m. to 7 a. m., from 12 Noon to 1 p. m., from 6 p. m. to 7 p. m., and from 12 Midnight to 1 a. m.

. . . . .

"3 (a) Straight time rate shall be paid for any work performed

"all other time," were in almost all instances[4] 150% of the "straight time" rates. The 1943 Agreement embodied the practice of the industry since 1916, whereby approximately 150% of "straight time" rates was paid for night and weekend work. Through the years, with successive renewals of agreements between the International Longshoremens Association and the employers, the rates of pay have risen and the length of the "basic working week" has decreased. The respondents, members of the International Longshoremens Association, did a large part of their work for the petitioners outside of the enumerated "straight time" hours. In accordance with the collective agreement, they received, for whatever work they did during the "basic working week," "straight time" pay, and for work at all other times, "overtime" pay, drawing such "overtime" pay regardless of whether such work was or was not part of their first forty hours of work in the week.[5] They instituted this action, for double damages under § 16 (b) of the Fair Labor Standards Act, 52 Stat. 1060, 1069, 29 U. S. C. § 216 (b), assert-

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from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.

"(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

"(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved. . . ."

[4] For purposes of this case, the "overtime" rate may be regarded as 150% of "straight time" in all instances, since the District Court allowed the respondents to recover for those few instances where the "overtime" was slightly less, and this portion of its judgment was not appealed.

[5] On the other hand, although the contract did not so specify, in the unusual situation of a longshoreman working over forty hours of "straight time" for one employer in one week, he was paid time and a half for the excess. Where this had not been done, the District Court allowed appropriate recovery, and this was not appealed.

ing that night and weekend work had been so frequent an incident of their employment that the contractual "straight time" pay could not be deemed their "regular rate" of pay, under § 7 (a), but that their "regular rate" was the average of what they received for all their work for any one employer, "straight time" and "overtime" together. On this theory, rejected by the union, the employers, and the Government, but now accepted by the Court, all work beyond forty hours per week for any one employer should have been paid for at one and one-half times this average.

The statutory phrase "regular rate" is not a technical term. Thirteen expressions used in the Fair Labor Standards Act were defined by Congress in § 3. "Regular rate" was left undefined. The legislative history of the phrase reveals only that it replaced "agreed wage" in an earlier draft, but there is no indication that this modification had significance. Nor is there any indication that in the field of labor relations, "regular rate" was a technical term meaning the arithmetic average of wages in any one week. If ordinary English words are not legislatively defined, they may rightly be used by the parties to whom they are addressed to mean what the parties through long usage have understood them to mean, when the words can bear such meaning without doing violence to English speech. The "regular rate" can therefore be established by the parties to a labor agreement, provided only that the rate so established truly reflects the nature of the agreement and is not a subterfuge to circumvent the policy of the statute. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424. Thus the problem before us is whether the designation of "straight time rates" for the "basic working week" in the longshoremen's collective agreement was an honest reflection of the distinctive conditions of this industry.

We are not concerned with an abstract "regular rate" of pay, for industry is not. The "regular rate" in a given

industry must be interpreted in the light of the customs and practices of that industry. The distinctive conditions of the longshoremen's trade, where employees frequently work during one week for several different employers, are reflected in the provisions which the industry has made in determining rates of compensation. These provisions were designed to secure for longshoremen protection not only from harmful practices common to many industries and dealt with specifically by the statute, but also from those peculiar to the longshoremen's industry, requiring special treatment.

The respondents' wages, as part of a comprehensive arrangement for the betterment of the longshoremen's trade—also covering health and sanitary provisions, minimum number of men in a gang doing specified types of work, "shaping time," minimum hours of employment for those chosen at a "shape," arbitration, etc.—were determined by a collective agreement entered into between the union and the employers. The Fair Labor Standards Act was "intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining." H. R. Rep. No. 1452, 75th Cong., 1st Sess., p. 9. "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." Sen. Rep. No. 884, 75th Cong., 1st Sess., pp. 3–4.[6] Such as-

[6] Similar intentions were expressed again and again in the Committee Hearings and on the floor of both Houses of Congress by the spokesmen of the Administration and Congressional Committee members. See the Joint Hearings before the Senate Committee on Labor

surances were necessary to allay the traditional hostility of organized labor to legislative wage-fixing. The Court now holds unlawful a collective agreement entered into by a strong union, governing the wide range of the longshoremen's employment relationships, and especially designed to restrict the hours of work and to require the same premium as that given by the statute for work done outside of normal hours but within the statutory limit. The Court substitutes an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive of the process of collective bargaining under which the industry has been carried on. But, we are told, these untoward consequences are compelled by a mere reading of what Congress has written.

On the question you ask depends the answer you get. If the problem is conceived of merely as a matter of arithmetic you get an arithmetical answer. If the problem is put in the context of the industry to which it relates, and meaning is derived from an understanding of the problems of the industrial community of which this is just one aspect, a totally different set of considerations must be respected. The defendants derived their rights from the entire agreement and not from a part mutilated by isolation. If the parties had written out with unambiguous explicitness that the extra wage in the scheduled periods is to be deemed a deterrent against work during those periods and is not to be deemed a basis for calculating time and a half after the forty hours, I cannot believe that this Court would say that such an agreement,

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and Education and the House Committee on Labor, 75th Cong., 1st Sess., pp. 46–47 (Asst. Atty. Gen. Jackson); *id.* pp. 181–83 (Secy. Perkins and Sen. Walsh); 81 Cong. Rec. 7650, 7651, 7808 (Sen. Black); 7652, 7799, 7800, 7885–86, 7937 (Sen. Walsh); 7813 (Sen. Pepper); 82 Cong. Rec. 1390 (Rep. Norton); 1395 (Rep. Randolph); 83 Cong. Rec. 7291 (Rep. Allen); 7310 (Rep. Fitzgerald); 9258 (Rep. Randolph).

made in palpable good faith, is outlawed by the Fair Labor Standards Act.

How is compensation for services above the limits set by the Act to be reckoned? The standard for compensation could be determined (1) by specific statutory terms; (2) by collective agreement; or (3) by judicial construction in default of either.

Congress could have laid down a hard and fast rule, could have expressed a purely arithmetic formula. It could have said that the rate on which time and a half is to be reckoned is to be found by dividing the total wage by the hours worked. It would not even have been necessary to spell all this out. Congress could have conveyed its thought by using the phrase "average" instead of "regular." And where we have nothing else to go on, except the total wage and the hours, it is reasonable enough thus to ascertain the regular rate. But when parties to a complicated industrial agreement, with full understanding of details not peculiarly within the competence of judges, indicate what the regular rate is for purposes of contingencies and adjustments satisfied otherwise than by a purely arithmetic determination of the rate of wages, nothing in the history of the law or its language precludes such desirable consensual arrangements, provided, of course, that the parties deal at arm's length, and that the defined "regular" rate is not an artifice for circumventing the plain commands of the law. Such an artifice would obviously not be used in a contract made by workers in their own interests represented by a union strong enough to pursue those interests. Regularity in this context implies of course a controlling norm for determining wages which, though agreed upon between the parties, is consistent with, and not hostile to, the underlying aims of the overtime provision of the Fair Labor Standards Act. Discouragement of overwork and of under-

employment are the aims. The longshoremen's collective agreement serves the same purpose as does the statute.

The Fair Labor Standards Act is not a legislative code for the government of industry. It sets a few minimum standards, leaving the main features in the employment relation for voluntary arrangement between the parties. Where strong unions exist, relatively little of the employment relation was to be enforced by law. Most of it was left to be regulated by free choice and usage as expressed and understood by the unions and employers. Congress did not provide for increase in basic rates except to the limited extent of establishing minimum wages. The inclusion of such minimum wages is in itself a recognition by Congress of the distinction between what it sought to change and what it sought to use only as the basis for the computation of an overtime percentage.

The claim of the few members in opposition to the union is predicated upon an amount superadded for reasons peculiar to the stevedoring industry to the wage which the parties to the agreement in perfect good faith established as the regular rate. The union members secured this extra wage as part of the entire scheme of the collective agreement.[7] This premium is not to be detached from the scheme as though it were a rate fixed by law as a basis for calculating the statute's narrowly limited overtime provision. So long as its minimum wage provisions were complied with, the statute did not seek to change the true basic or "regular" rate of pay in any industry, from which rate all statutory overtime is to be computed. There is no justification for interpreting the statutory term as including elements clearly understood

[7] Cf. Lord Stowell, in *The Neptune*, 1 Hagg. Adm. *227, *232: ". . . the natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages."

in the industry to be as foreign to the "regular rate" as any strictly overtime rates. Here the extra wage is the industry's overtime rate for work which might not be within the overtime period of the Fair Labor Standards Act, but was within the schedule of the collective agreement for extra wages, not because the work was overtime in the ordinary industrial sense but because it was at periods during which all work was sought to be discouraged by making it costly. Because the union secured for its men an extra wage even for not more than forty working hours, the scope of the Fair Labor Standards Act as to overtime is not enlarged. Only for a work-week longer than forty hours is an employee to be paid one and a half times "the regular rate," and nothing in the Act precludes agreement between the parties as to what the regular rate should be, provided such agreement is reached in good faith and as a fair bargain. The presupposition of the Act was that voluntary arrangements through collective bargaining should cover an area much wider, and economically more advantageous, than the minimum standards fixed by the Act. The traditional process of collective bargaining was not to be disturbed where it existed. It was to be extended by advancing the economic position of workers in non-unionized industries and in industries where unions were weak, by furthering equality in bargaining power. It certainly was not the purpose of the Act to permit the weakening of a strong union by eviscerating judicial construction of the terms of a collective agreement contrary to the meaning under which the industry had long been operating and for which the union is earnestly contending.

There can be no quarrel with the generality that merely because the conditions of employment are arrived at through collective bargaining an arrangement which violates the statute need not be upheld. But this does not

mean that in determining whether the contractual designation of certain hours as "basic" is honest and fair, we cannot consider the fact that the contract was one entered into by a powerful union, familiar with the needs of its members and the peculiar conditions of the industry, and fully equipped to safeguard its membership. To view such a contract with a hostile eye is scarcely to carry out the purpose of Congress in enacting the Fair Labor Standards Act.

This Court has sustained the power of "employer and employee . . . to establish [the] regular rate at any point and in any manner they see fit," *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424, provided that the regular rate is not computed "in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42. If we were confronted with an agreement which did not reflect the true practice in the industry, if despite the designation of certain hours as "basic" and others as "overtime," the distinction was not actually observed, but work was done at all times indiscriminately, so that what the contract designated as "overtime" pay was in reality a "shift differential," designed to induce employees to work at less pleasant hours, rather than to deter employers from carrying on at such hours, the labels attached by the parties to the various periods of work would not be allowed to conceal the true facts. We have again and again pierced through such deceptive forms. See, *e. g.*, *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199. But here there is no suggestion that the agreement mislabeled the true circumstances of the employment relationship. And it is significant that in no case in which we found

that the terms used had distorted the true facts did a union which had made the contract appear to defend it.

The fact that some work was done at odd hours does not misrepresent the regular situation, provided that such work was exceptional and was restricted in frequency by the overtime provisions of the agreement, so that what the agreement treated as regular and what as exceptional were truly just that. We turn then to the actual experience, in representative periods, of the Port of New York longshoremen. The stipulations, exhibits, and findings of the District Court, all demonstrate the exceptional nature of "overtime" work.[8] It is also apparent that such night work as was done was usually done in addition to, rather than instead of, daytime work. The increased compensation for such work therefore served principally to achieve the same result as did the statute—namely, to afford a higher rate of compensation for long hours. In peacetime, night work was extremely rare for anyone as a recurring experience, and even during the exigencies of war only a small minority was principally so occupied.

The accuracy of the designation of one period or

[8] The following figures were either stipulated by the parties, found as facts by the District Court and concurred in by the Circuit Court of Appeals and this Court, or computed from such statistics:

	1932–37 average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944–Mar. 31, 1945 (height of wartime activity)
Work performed during straight time hours	79.93%	75.03%	54.5%
Night work	15.13%	17.89%	20.5%
Weekend work	4.94%	7.08%	25.0%
Total night work by men who had worked during same day	13.2%	23.29%	44.5%
Ditto by those who had not	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime	11.22	8.47	3.38

amount of work as "basic" is not contradicted by the fact that some work may have been done at other times as well. The very reference in any collective agreement to overtime pay for unusual hours implies that some such work is anticipated. A protective tariff need not be so high as to exclude every last item. The statistics in the margin amply justify the trial judge's conclusion that the designations in the collective agreement were not unreal or artificial when the agreement was entered into, and did not become so even at the height of the abnormal wartime effort.

Of course, even if most of the work of longshoremen was performed during "straight time" hours, if the 50% increment for work at other times was not a true overtime payment, but a shift differential, this higher rate of pay would have to be taken into account in establishing the "regular rate" of the respondents. But the District Court found that this premium constituted true overtime. As that court stated (Finding 28), a shift differential

> "is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts,"

while a true overtime premium

> "is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate."

These findings of the District Court are amply supported by the testimony and by industrial statistics. See 65 Monthly Labor Review 183–85; Wage Structure: Machinery (Bureau of Labor Statistics 1945) p. 21; *id.* (1946) p. 38; Wage Structure: Foundries (Bureau of Labor Statistics 1945) Tables 32, 33; *id.* (1946) pp. 44–45. And compare the Directives of the Economic Stabilization Director dated March 8, 1945, and April 24, 1945, limiting the shift differentials which the National War Labor Board could approve to four cents per hour for the second shift and six or eight cents per hour for the third. CCH Labor Law Service, vol. 1A, ¶¶ 10,034.11, 10,462. Applying the test based on Finding 28, and finding also that the differential had in fact served to deter night and week-end work, the District Court held that the fifty per cent increment was true overtime and not a shift differential.

The Court purports to accept the findings of the District Court, and yet it concludes that the District Court erred in finding that the fifty per cent was by way of overtime and not a shift differential. The District Court, to be sure, did not explicitly state that the premium was not a shift differential in one of its formal Findings of Fact. It did so state, however, in its opinion and this conclusion depended on the statements quoted above from Finding 28 as to the characteristics indicative of true overtime and shift differentials. I fail to see how this Court can accept Finding 28 and reject the conclusion that the contractual "overtime" was not a shift differential.

Findings of lower courts are to be disregarded only if not substantiated by the evidence. Here, the evidence supporting the finding was impressive, and yet the Court strains to overturn it to reach a result not urged as socially desirable but only as demanded by legal dialectic.[9]

[9] That the hours designated by the agreement as "overtime" were regarded by the union as *excessive* hours, rather than merely as

The Court holds that even if the collective agreement accurately designated the regular and overtime work of the generality of longshoremen, it cannot apply to the respondents, because of their particular working hours for a stretch of the wartime period here in controversy. This contention expresses an attitude toward the process of collective bargaining which, if accepted, would undermine its efficacy. It subjects the collective agreement to the hazards of self-serving individualism, which must inevitably weaken the force of such agreements for improving the conditions of labor and forwarding industrial peace. Here, the very increased rates of pay which the respondents received for exceptional night and weekend work was the result of the contract which they now seek to disavow.

Collective bargaining between powerful combinations of employers and employees in an entire industry, each group conscious of what it seeks and having not merely responsibility for its membership but resourceful experience in discharging it, is a form of industrial government whereby self-imposed law supplants force. Cf. Feis, The Settlement of Wage Disputes (1921) c. II. This is an accurate description of the process by which the stevedoring industry has served the greatest port in the United States. Yet the Court rejects the meaning which the parties to the agreement have given it and says it means what the parties reject. Often, too often, industrial strife is engendered by conflicting views between employers and employees as to the meaning of a collective agree-

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unpleasant hours, may also be deduced from the fact that they included much weekday time in which there was ample daylight during a large part of the year, and were not confined to nights and weekends. Another indication of the same thing is the fact that the history of the union agreements for New York longshoremen reveals a succession of reductions of the total number of "straight time" hours parallel to the reduction of the usual weekly working hours during the same period throughout American industry.

ment. Here the industry as an entirety—the union and the employers' association—is in complete accord on the meaning of the terms under which the industry has lived for thirty years and under which alone, the parties to the agreement insist, they can continue to live peacefully. But a few members of the union assert an interest different from that of their fellows—some thirty thousand—and urge their private meaning even though this carries potential dislocation to the very agreement to which they appeal for their rights. Unless it be judicially established that union officers do not know their responsibility or have betrayed it, so that what appears to be a contract on behalf of their men is mere pretense in that it does not express the true interests of the union as an entirety, this Court had better let the union speak for its members and represent their welfare, instead of reconstructing, and thereby jeopardizing, arrangements under which the union has lived and thrived and by which it wishes to abide.[10]

Collective agreements play too valuable a part in the government of industrial relationships to be cast aside at the whim of a few union members who seek to retain their benefits but wish to disavow what they regard as their burdens. Unless the collective agreement is held to determine the incidents of the employment of the entirety for whom it was secured, it ceases to play its great role as

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[10] Of course, if it can be shown that particular employees—for reasons of color, lack of seniority, or anything else—were not fairly or properly represented in the collective bargaining agreement, and were discriminated against and forced into a less desirable class of work, not because of accident or their own desire but because of the deliberate policy of the employers, the union, or both, we cannot treat the agreement made for the generality of longshoremen as binding upon them as well. See *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. The respondents' claim was not based upon any such allegation.

an instrument of industrial democracy. Cf. Rice, *Collective Labor Agreements in American Law,* 44 Harv. L. Rev. 572; Wolf, *The Enforcement of Collective Labor Agreements: A Proposal,* 5 Law & Contemp. Prob. 273; Hamilton, *Collective Bargaining,* 3 Encyc. Soc. Sci. 628, 630.

But furthermore, as I read the Court's opinion, it is not limited in application to those employees most or all of whose work was done at night, but extends equally to those who worked chiefly during the "basic working week," but also did a few hours of work at other times. Even where a longshoreman worked precisely forty hours of "straight time," followed by a few hours of "overtime" in the same week, payment of the appropriate wages as determined by the collective agreement would not satisfy the Court's test that only such extra pay as is given "for work because of previous work for a *specified* number of hours in the workweek or workday" [11] can be regarded as true overtime pay. To require specification in an industry where the only thing certain is uncertainty is to command the impossible. There is no justification for such a test in the statute, its history, industrial practice, judicial decision, or administrative interpretations.[12]

In short, this is not a decision that where the predominant work of an employee is paid for at "overtime" rates, such rates enter into computation of the "regular rate," but rather that where the conditions in an industry are such that the number of "straight time" hours cannot be precisely predicted in advance, an arrangement for time and a half for all other hours cannot be legal, regardless of how unusual work outside of the "straight time" hours may be.

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[11] Italics supplied.

[12] The Interpretations of the Wage-Hour Administrator pertinent to this case are conflicting and inconclusive. Citation of the most relevant should suffice. Cf. §§ 69, 70, Interpretative Bulletin No. 4, Wage and Hour Division, Department of Labor.

But whether or not the Court means to go as far as it seems to go, and even if its holding is later limited to the narrow situation now before us, I cannot agree with its conclusion. It seems to me that the "regular rate" of pay for Port of New York longshoremen was the "straight time" scale provided for by the union contract, and that this was true for the whole union, including the individual respondents. Far from receiving less overtime than the statute required, the respondents were, through the agreement, the recipients of much more. To call their demand one for "overtime pyramided on overtime" is not to use a clever catchphrase, but to describe fairly the true nature of their claim.

I would reinstate the judgments of the District Court.

UNITED STATES v. COLUMBIA STEEL CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

No. 461. Argued April 29–30, 1948.—Decided June 7, 1948.

1. The United States sued under § 4 of the Sherman Act to enjoin the acquisition by United States Steel Corporation of the assets of Consolidated Steel Corporation, largest independent steel fabricator on the West Coast, as a violation of §§ 1 and 2 of the Act. The gist of the complaint was (1) that the acquisition would be in restraint of trade, because all manufacturers other than United States Steel would be excluded from the business of supplying Consolidated's requirements of rolled steel products, and because existing competition between Consolidated and United States Steel in the sale of structural fabricated products and pipe would be eliminated; and (2) that the proposed acquisition, in the light of previous acquisitions by United States Steel, was an attempt to monopolize the production and sale of fabricated steel products in the Consolidated market area. *Held:* The proposed acquisition would not violate § 1 or § 2 of the Sherman Act. Pp. 507–508, 519–534.

(a) The acquisition does not unreasonably restrict the opportunities of competitor producers of rolled steel to market their product. Pp. 519–527.

(b) There was no specific intent in this case to accomplish an unreasonable restraint of interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, distinguished. Pp. 520–527.

(c) It is not proved in this case that the elimination of competition between Consolidated and the structural fabricating subsidiaries of United States Steel constitutes an unreasonable restraint of trade. P. 529.

(d) The elimination of competition between Consolidated and National Tube (a United States Steel subsidiary) does not constitute an unreasonable restraint of trade in pipe, in view *inter alia* of the limited extent of the competition between them in this field. Pp. 530–531.

(e) In the light of previous acquisitions by United States Steel, including that of the government-owned plant at Geneva, Utah, the acquisition of Consolidated does not demonstrate the existence of a specific intent to monopolize, but reflects rather a normal business purpose. Pp. 531–533.

(f) Considering the various objections in the aggregate and in the light of the charge of intent to monopolize, the acquisition does not violate the public policy manifested in the Sherman Act. Pp. 533–534.

2. The Sherman Act is not limited to eliminating restraints whose effects are nation-wide; but, where the relevant competitive market covers a lesser area, the Act may be invoked to prevent unreasonable restraints in that area. P. 519.
3. Withdrawal of Consolidated as a consumer of rolled steel products made by other producers does not constitute an unreasonable restraint. Pp. 520–523.
4. Vertical integration is not illegal *per se*. Its legality is to be determined by, *inter alia*, (1) characterizing the nature of the market to be served and the leverage on the market which the particular vertical integration creates, and (2) the purpose or intent with which the combination was conceived. *United States* v. *Paramount Pictures*, 334 U. S. 131, and *United States* v. *Griffith*, 334 U. S. 100, followed. Pp. 524–527.
5. There is no declared public policy which forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nation-wide or smaller in area. P. 526.

6. The same tests which measure the legality of vertical integration by acquisition are applicable to the acquisition of competitors in identical or similar lines of merchandise. It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. P. 527.
7. In determining what constitutes unreasonable restraint, dollar volume in itself is not of compelling significance. Consideration must also be given to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. The relative effect of percentage command of a market varies with the setting in which that factor is placed. Pp. 527–528.
8. Even though a restraint of trade be reasonable and not unlawful under § 1 of the Sherman Act, it may nevertheless constitute an attempt to monopolize in violation of § 2 if a specific intent to monopolize be shown. Pp. 531–532.

74 F. Supp. 671, affirmed.

The United States brought a suit under § 4 of the Sherman Act to enjoin, as a violation of §§ 1 and 2 of the Act, the acquisition of the Consolidated Steel Corporation by the United States Steel Corporation. After a hearing on the merits, the District Court denied the relief prayed in the complaint. 74 F. Supp. 671. A direct appeal was taken to this Court under the Expediting Act. *Affirmed,* p. 534.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Sonnett, Charles H. Weston, Robert L. Wright, Robert G. Seaks* and *Victor H. Kramer.*

Nathan L. Miller argued the cause for the Columbia Steel Co. et al., appellees. With him on the brief were *Roger M. Blough, Merrill Russell* and *Edwin D. Steel, Jr.*

Alfred Wright argued the cause for the Consolidated Steel Corporation, appellee. With him on the brief was *Aaron Finger*.

MR. JUSTICE REED delivered the opinion of the Court.

The United States brings this suit under § 4 of the Sherman Act to enjoin United States Steel Corporation and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the West Coast on the ground that such acquisition would violate §§ 1 and 2 of the Sherman Act.[1] The complaint, filed on February 24, 1947, charged that if the contract of sale between United States Steel and Consolidated Steel Corporation were carried out, competition in the sale of rolled steel

[1] Sections 1, 2 and 4, 15 U. S. C., read, so far as applicable, as follows:

§ 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 4. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ."

products and in fabricated steel products would be restrained, and that the contract indicated an effort on the part of United States Steel to attempt to monopolize the market in fabricated steel products. After a trial before a single judge in the district court, judgment was entered in favor of the defendants, and the government brought the case here by direct appeal. 32 Stat. 823, 15 U. S. C. § 29.

The underlying facts in the case are set forth in the findings of the trial court, and with a few exceptions those findings are not disputed by the government. We rely chiefly on the findings to indicate the nature of the commerce here in question and the extent to which competition would be affected by the challenged contract.

The steel production involved in this case may be spoken of as being divided into two stages: the production of rolled steel products and their fabrication into finished steel products. Rolled steel products consist of steel plates, shapes, sheets, bars, and other unfinished steel products and are in turn made from ingots by means of rolling mills. The steel fabrication involved herein may also be divided into structural fabrication and plate fabrication. Fabricated structural steel products consist of building framework, bridges, transmission towers, and similar permanent structures, and are made primarily from rolled steel shapes, although plates and other rolled steel products may also be employed. Fabricated plate products, on the other hand, consist of pressure vessels, tanks, welded pipe, and similar products made principally from rolled steel plates, although shapes and bars are also occasionally used. Both plate and structural fabricated products are made to specifications for a particular purpose; fabricated products do not include standard products made by repetitive processes in the manufacture of general steel merchandise such as wire, nails, bolts, and

window frames. The manufacture of such standardized finished products is not involved in this case. The facilities required for structural fabrication are quite different from those required for plate fabrication; the former require equipment for shearing, punching, drilling, assembling, and riveting or welding structural shapes whereas the latter require equipment for bending, rolling, cutting, and forming the plates which go into the finished product.

The complaint lists four defendants: Columbia Steel Company, Consolidated Steel Corporation, United States Steel Corporation, and United States Steel Corporation of Delaware. United States Steel and its subsidiaries engage in the business of producing rolled steel products and in structural fabrication, but do no plate fabrication work. Consolidated Steel, the sale of whose assets the government seeks to enjoin, is engaged only in structural fabrication and plate fabrication. United States Steel with its subsidiaries is the largest producer of rolled steel products in the United States, with a total investment of more than a billion and a half dollars. During the ten-year period 1937–1946 United States Steel produced almost exactly a third of all rolled steel products produced in the United States, and average sales for that period were nearly a billion and a half dollars. In the five-year period 1937–1941, average sales were a little over a billion dollars. Consolidated, by contrast, had plants whose depreciated value was less than ten million dollars. During the five-year period 1937–1941, Consolidated had average sales of only twenty million dollars, and the United States Steel committee which negotiated the terms of the purchase of Consolidated estimated that Consolidated's sales in the future would run to twenty-two million dollars annually and agreed with Consolidated on a purchase price of slightly in excess of eight million dollars. During the war Consolidated produced over a

billion and a half dollars worth of ships with government-furnished facilities. Consolidated no longer possesses any facilities for building ships.[2]

Columbia Steel, a wholly-owned subsidiary of United States Steel, has been the largest rolled steel producer in the Pacific Coast area since 1930, with plants in Utah and California, and has also served as selling agent for other rolled steel subsidiaries of United States Steel, and for two subsidiaries of that company engaged in structural fabrication, the American Bridge Company at Pittsburgh and the Virginia Bridge Company at Roanoke, Virginia, though neither it nor any other subsidiary of United States Steel in the Consolidated market area was a fabricator of any kind. National Tube Company, another United States Steel subsidiary, sells pipe and tubing. Consolidated has structural fabricating plants near Los Angeles and at Orange, Texas, and plate fabricating facilities in California and Arizona. Consolidated has sold its products during the past ten years in eleven states, referred to hereafter as the Consolidated market: Arizona, California, Idaho, Louisiana, Montana, Nevada, New Mexico, Oregon, Texas, Utah and Washington. It is that market which the government views as significant in determining the extent of competition between United States Steel and Consolidated. It is not the usual Pacific

[2] An uncontested statement of Consolidated's ship building activities during the war years appears in Consolidated's brief:

"During the war years, acting under Government sponsorship, Consolidated constructed ships for defense and war purposes for various Government procurement agencies but it is no longer engaged in this field. Consolidated's war work was confined to ship and ordnance construction with Government furnished facilities, all of which have now been abandoned. Consolidated Shipyards, Inc., a Consolidated subsidiary operating a small boat yard, has disposed of its plant to a group of real estate speculators. There is, therefore, no competition between U. S. Steel and Consolidated in the shipbuilding business."

and Mountain states groups employed by the Census.[3] United States Steel Corporation of Delaware is a subsidiary of United States Steel which renders technical assistance to other subsidiaries engaged in steel production.

Rolled steel products have traditionally been sold on a basing point system.[4] Prior to World War II rolled steel was sold on the West Coast at a price computed on the basis of eastern basing points, even though both United States Steel and Bethlehem Steel produced rolled steel products in California. Fabricators such as Consolidated thus did not get the full benefit of their proximity to the western market. The competitive disadvantages under which western fabricators worked is illustrated by the fact that United States Steel has been the largest seller of fabricated structural steel in the Consolidated market, even though it has no fabricating plants in the area. During the ten-year period ending in 1946, 100 different concerns bid successfully in competition with United States Steel for the sale of fabricated structural products

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[3] Louisiana and Texas, which are included in the Consolidated market, are not listed in the census grouping, whereas Colorado and Wyoming, which are listed in the census, are excluded from the Consolidated market. Sixteenth Census of the United States, 1940, Areas of the United States 1940, Bureau of the Census, p. 3.

[4] In 1924 the Federal Trade Commission entered an order which concluded that United States Steel had violated § 2 of the Clayton Act and § 5 of the Federal Trade Commission Act by its so-called "Pittsburgh plus" method of pricing, according to which all rolled steel products were sold at a delivered price including freight from Pittsburgh to the destination, regardless of the actual point of shipment. *Matter of United States Steel Corp.*, 8 F. T. C. 1. United States Steel was ordered to cease and desist from selling its products on that basis, or from employing any basing point other than the point of manufacture or shipment. In 1938 United States Steel filed a petition to review that order in the Third Circuit Court of Appeals admitting that United States Steel had never complied with the latter part of the order. No decision has yet been reached in that proceeding.

in the Consolidated market; 50 of those concerns are located outside the area. United States Steel's principal competitor as measured on a national basis, Bethlehem Steel, does have fabricating facilities in California, however, and prior to World War II United States Steel had prepared plans for the erection of fabricating facilities in California. The war made it necessary to postpone the plans. This use of eastern basing points makes past figures on rolled steel product sales from producers in the Consolidated market unreliable in determining effective competition for the future sales of rolled steel in that market. United States Steel now uses Geneva as a basing point.

The urgent wartime demand for steel prompted the government to construct new rolled steel plants in the West. The largest of these plants was erected at Geneva, Utah, at a cost of nearly $200,000,000, and was designed, constructed, and operated by United States Steel for the account of the government. The plant had an annual capacity of more than 1,200,000 tons of ingots, which in turn could be employed to make 700,000 tons of plates and 250,000 tons of shapes. Another large plant was erected by the government at Fontana, California. This is now operated through arrangements of private parties with the government. In January 1945 United States Steel considered the acquisition of the Geneva plant, but because of the speculative nature of the venture and attacks by people within and without the government, United States Steel decided not to submit a bid and notified the Defense Plant Corporation to that effect on August 8, 1945. Shortly thereafter the Surplus Property Administrator wrote to Benjamin F. Fairless, President of United States Steel, advising him that a bid by United States Steel would be welcomed. On May 1, 1946, United States Steel submitted a bid for the Geneva plant of $47,500,000. The terms of the bid provided that United

States Steel would spend not less than $18,000,000 of its own funds to erect additional facilities at Geneva, and $25,000,000 to erect a cold-reduction mill at Pittsburg, California, to consume 386,000 tons of hot rolled coils produced at Geneva.[5] The bid estimated that a sufficient market could be found to absorb an annual production ranging from 456,000 to 600,000 tons. The bid stipulated that Geneva products would be sold with Geneva as a basing point. This would offer possibilities for a reduction in the price of rolled steel products to West Coast purchasers and their customers. The variation between 456,000 and 600,000 tons depended on the consumption of rolled steel products by users other than United States Steel's new Pittsburg plant. The bid noted that additional steel consuming manufacturing plants might be located in the West which would provide a market for additional rolled steel products. Apart from the cold-reduction mill to be erected at Pittsburg, the bid was silent as to the acquisition of fabricating facilities by United States Steel to provide a market for Geneva products.

On May 23, 1946, the War Assets Administration announced that the bid of United States Steel was accepted. An accompanying memorandum discussed in detail the six bids which had been received, and concluded that United States Steel's bid was the most advantageous. The other bids were found unacceptable for a number of reasons; either the bidder could offer no assurance of his financial responsibility or his ability to operate the plant, or the price offered was too low, or the bidder requested

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[5] Cold rolling is the name given to the process of rolling steel products at temperatures ranging from 50° F. to 240° F. Coils which have been produced by the hot rolling process are fed into a cold-reduction mill and rolled into strip and sheets which are of much higher quality than hot rolled strip and sheets. See Camp and Francis, *The Making, Shaping and Treating of Steel* (5th ed., 1940), pp. 1227–1245.

the government to lend the bidder large sums for the erection of additional facilities or to erect such facilities at government expense.[6] The memorandum noted that the successful bid would "foster the development in the West of new independent enterprise" by encouraging the location of steel-consuming manufacturing plants in the western states.

On June 17, 1946, the Attorney General advised the War Assets Administration that the proposed sale did not in his opinion constitute a violation of the antitrust laws, and the sale was consummated two days thereafter. The opinion of the Attorney General was requested in accordance with § 20 of the Surplus Property Act of 1944, 58 Stat. 765, 775, which requires such procedure when government plants costing more than $1,000,000 are being sold. That section provides that nothing in the Surplus Property Act "shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons" who buy property under the Act. The Attorney General noted that the ingot capacity of United States Steel had declined from 35.3% of the total national capacity in 1939 to 31.4% in 1946, and that if the Geneva plant were acquired, the percentage would be increased to 32.7%. Considering only the Pacific Coast and Mountain states, the acquisition of Geneva, the Attorney General said, would increase United States Steel's percentage of capacity in that area from 17.3% to 39%. United States Steel, however, estimated that

[6] The bid of Colorado Fuel & Iron Corp. proposed that the government spend $47,935,000 for the erection of additional facilities, including over $25,000,000 for the erection of a sheet and tin-plate mill. The bid of Pacific-American Steel Iron Corp. proposed that the government lend the bidder $25,000,000 for the erection of a tin-plate mill. The bid of Riley Steel Co. proposed that the government lend the bidder $28,844,000 for the construction of a sheet mill, tube mill, and additions to the structural mill.

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on acquisition of Geneva it would have 51% of ingot capacity in the Pacific Coast area. On the basis of these figures construed in the light of *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, and *American Tobacco Co.* v. *United States,* 328 U. S. 781, the Attorney General concluded that the proposed sale, as such, would not violate the antitrust laws. The letter added that no opinion was expressed as to the legality of any acts or practices in which United States Steel might have engaged or in which it might engage in the future. See for a comparable situation *United States* v. *United States Steel Corp.,* 251 U. S. 417, 446.

Prior to the sale of the Geneva plant, Alden G. Roach, President of Consolidated, approached Fairless of United States Steel and indicated that he would like to sell the business of Consolidated. Roach also had conversations with representatives of Bethlehem and Kaiser with regard to the same end. Roach mentioned the subject again to Fairless in February or March of 1946, and Fairless replied that United States Steel was restudying its decision not to bid on the Geneva plant, and did not want to discuss the purchase of Consolidated until the Geneva issue was decided. After the sale of Geneva was effected in June, Fairless spoke again with Roach and arranged to have a committee from United States Steel make an investigation of the Consolidated plants in August. The committee reported that it would cost $14,000,000 and take three years to construct plants equivalent to those owned by Consolidated, and that the Consolidated properties had a depreciated value of $9,800,000. After further negotiations the parties agreed on a price of approximately $8,250,000, and a purchase agreement was executed on December 14 according to which Columbia agreed to buy the physical assets of Consolidated and four subsidiaries. Fairless testified on the witness stand that United States Steel's purpose in purchasing Consolidated was to assure a market for plates and shapes produced at Geneva, and

Roach testified that Consolidated's purpose was to withdraw the stockholders' equity from the fabrication business with its cyclical fluctuations at a time when a favorable price could be realized.

I.

The theory of the United States in bringing this suit is that the acquisition of Consolidated constitutes an illegal restraint of interstate commerce because all manufacturers except United States Steel will be excluded from the business of supplying Consolidated's requirements of rolled steel products, and because competition now existing between Consolidated and United States Steel in the sale of structural fabricated products and pipe will be eliminated. In addition, the government alleges that the acquisition of Consolidated, viewed in the light of the previous series of acquisitions by United States Steel, constitutes an attempt to monopolize the production and sale of fabricated steel products in the Consolidated market. The appellees contend that the amount of competition which will be eliminated is so insignificant that the restraint effected is a reasonable restraint not an attempt to monopolize and not prohibited by the Sherman Act.[7] On the record before us and in agreement with the

[7] This was not a purchase of stock of a competing company. See § 7, Clayton Act, 38 Stat. 730, 731; *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U. S. 554. It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints. See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Col. L. Rev. 179, 266.

In 1941 the Temporary National Economic Committee proposed that § 7 be amended to apply to acquisition of assets and to require prior approval by the Federal Trade Commission. See Comment, 57 Yale L. J. 613, for a description of the bills which have been introduced before Congress to carry out these recommendations.

trial court we conclude that the government has failed to prove its contention that the acquisition of Consolidated would unreasonably lessen competition in the three respects charged, and therefore the proposed contract is not forbidden by § 1 of the Sherman Act. We further hold that the government has failed to prove an attempt to monopolize in violation of § 2.

We turn first to the charge that the proposed purchase will lessen competition by excluding producers of rolled steel products other than United States Steel from supplying the requirements of Consolidated. Over the ten-year period from 1937 to 1946 Consolidated purchased over two million tons of rolled steel products, including the abnormally high wartime requirements. Whatever amount of rolled steel products Consolidated uses in the future will be supplied insofar as possible from other subsidiaries of United States Steel, and other producers of rolled steel products will lose Consolidated as a prospective customer.

The parties are in sharp dispute as to the size and nature of the market for rolled steel products with which Consolidated's consumption is to be compared. The appellees argue that rolled steel products are sold on a national scale, and that for the major producers the entire United States should be regarded as the market. Viewed from this standpoint, Consolidated's requirements are an insignificant fraction of the total market, less than ½ of 1%. The government argues that the market must be more narrowly drawn, and that the relevant market to be considered is the eleven-state area in which Consolidated sells its products, and further that in that area by considering only the consumption of structural and plate fabricators a violation of the Sherman Act has been established. If all sales of rolled steel products in the Consolidated market are considered, Consolidated's purchases of two million tons represent a little more than

3% of the total of 60 million tons. The figure is not appreciably different if the five-year period 1937–41 or 1946 alone is used as the measuring period.[8] If the comparable market is construed even more narrowly, and is restricted to the consumption of plates and shapes in the Consolidated market, figures for 1937 indicate that Consolidated's consumption of plates and shapes was 13% of the total. Data are offered by the government for 1946 which are too uncertain to furnish a reliable guide.[9]

[8] The following table was accepted by the trial court as correct:

Year	Industry production all rolled steel products	U. S. Steel subsidiaries production all rolled steel products	Estimated consumption all rolled steel products 11 States	U. S. Steel subsidiaries shipment of all rolled steel production into the 11 States	Consolidated's purchases all rolled steel products
1937	38, 345, 158	14, 097, 666	4, 362, 900	1, 556, 085	103, 286
1938	21, 356, 398	7, 315, 506	2, 670, 000	1, 046, 287	44, 050
1939	34, 955, 175	11, 707, 251	3, 630, 000	1, 434, 383	69, 862
1940	45, 965, 971	15, 013, 749	4, 337, 990	1, 686, 129	117, 644
1941	60, 942, 979	20, 416, 604	6, 008, 757	2, 441, 840	163, 428
1942	60, 591, 052	20, 615, 137	8, 489, 204	3, 181, 358	339, 711
1943	62, 210, 261	20, 147, 616	10, 124, 831	3, 706, 886	404, 180
1944	63, 250, 519	21, 052, 179	9, 587, 503	3, 495, 231	390, 532
1945	56, 602, 322	18, 410, 264	7, 232, 590	2, 378, 112	225, 273
1946	48, 993, 777	15, 181, 719	6, 000, 000	1, 810, 982	178, 669
Total	493, 213, 612	163, 957, 691	62, 443, 775	22, 737, 293	2, 036, 635

[9] The government notes that United States Steel in its bid for the Geneva plant estimated that the postwar market in seven Western states would be 227,000 tons of plates and 213,000 tons of shapes per year, and compares with these figures the 1946 purchases of Consolidated of 107,128 tons of plates and 43,770 tons of shapes. Apart from the fact that the figures for estimated consumption included only seven states as against eleven in the Consolidated market, Consolidated's purchases in 1946 were principally devoted to finishing up war contracts. The figures for estimated consumption were based on the assumption that the level of activity would be considerably lower than during the war.

The government realizes the force of appellees' argument that rolled steel products are sold on a national scale, and attempts to demonstrate that during the non-war years 80% of Consolidated's requirements were produced on the West Coast; Consolidated resorts to data not in the record to demonstrate that in fact only 26% of Consolidated's rolled steel purchases were produced in plants located in the Consolidated market area.[10] Whether we accept the government's or Consolidated's figures, however, they are of little value in determining the extent to which West Coast fabricators will purchase rolled steel products in the eastern market in the future, since the construction of new plants at Geneva and Fontana and the creation of new basing points on the West Coast will presumably give West Coast rolled steel producers a far larger share of the West Coast fabricating market than before the war.

Another difficulty is that the record furnishes little indication as to the propriety of considering plates and shapes as a market distinct from other rolled steel products. If rolled steel producers can make other products as easily as plates and shapes, then the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products. The record suggests, but does not conclusively indicate, that rolled steel producers can make other products interchangeably with shapes and plates, and that therefore

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[10] The table from which the government derives this figure of 80% is inconclusive. It refers to "Purchases from West Coast Producers" and does not indicate whether the producers themselves produced the rolled steel products or were acting as agents of eastern producers. There is no challenge to Consolidated's statement that during the years 1937–41 and 1946 deliveries to it from the rolled steel production of the West Coast totaled 208,093 tons as against 495,848 tons from eastern producers.

we should not measure the potential injury to competition by considering the total demand for shapes and plates alone, but rather compare Consolidated's demand for rolled steel products with the demand for all comparable rolled steel products in the Consolidated marketing area.

We read the record as showing that the trial court did not accept the theory that the comparable market was restricted to the demand for plates and shapes in the Consolidated area, but did accept the government's theory that the market was to be restricted to the total demand for rolled steel products in the eleven-state area. On that basis the trial court found that the steel requirements of Consolidated represented "a small part" of the consumption in the Consolidated area, that Consolidated was not a "substantial market" for rolled steel producers selling in competition with United States Steel, and that the acquisition of Consolidated would not injure any competitor of United States Steel engaged in the production and sale of rolled steel products in the Consolidated market or elsewhere. We recognize the difficulty of laying down a rule as to what areas or products are competitive, one with another. In this case and on this record we have circumstances that strongly indicate to us that rolled steel production and consumption in the Consolidated marketing area is the competitive area and product for consideration.

In analyzing the injury to competition resulting from the withdrawal of Consolidated as a purchaser of rolled steel products, we have been considering the acquisition of Consolidated as a step in the vertical integration of United States Steel. Regarded as a seller of fabricated steel products rather than as a purchaser of rolled steel products, however, the acquisition of Consolidated may be regarded as a step in horizontal integration as well, since United States Steel will broaden its facilities for

steel fabrication through the purchase of Consolidated. In determining the extent of competition between Consolidated and the two structural fabrication subsidiaries of United States Steel in the sale of fabricated steel products, we must again determine the size of the market in which the two companies may be said to compete. The parties agree that United States Steel does no plate fabrication, and that competition is restricted to fabricating structural steel products and pipe. Consolidated makes pipe by bending and welding plates, whereas National Tube, a United States Steel subsidiary, makes seamless pipe through a process which the parties agree does not fall under the heading of steel fabrication.

We turn first to the field of fabricated structural steel products. As in the case of rolled steel, the appellees claim that structural fabricators sell on a national scale, and that Consolidated's production must be measured against all structural fabricators. An index of the position of Consolidated as a structural fabricator is shown by its bookings for the period 1937–1942, as reported by the American Institute of Steel Construction. During that period total bookings in the entire country were nearly 10,000,000 tons, of which Consolidated's share was only 84,533 tons. The government argues that competition is to be measured with reference to the eleven-state area in which Consolidated sells its products. Viewed on that basis, total bookings for the limited area for the six-year period were 1,665,698, of which United States Steel's share was 17% and Consolidated's 5%. The government claims that Consolidated has become a more important factor since that period, and alleges that bookings for 1946 in the Consolidated market were divided among 90 fabricators, of which United States Steel had 13% and Consolidated and Bethlehem Steel each had 11%. The next largest structural fabricators had 9%,

6% and 3% of the total.[11] Although the appellees challenge the accuracy of the government's 1946 figures, and the district court made no reference to them in the findings, we accept them as sufficiently reliable for our present purpose. The figures on which the government relies demonstrate that at least in the past competition in structural steel products has been conducted on a national scale. Five out of the ten structural fabricators having the largest sales in the Consolidated market perform their fabrication operations outside the area, including United States Steel and Bethlehem Steel. Purchasers of fabricated structural products have been able to secure bids from fabricators throughout the country, and therefore statistics showing the share of United States Steel and Consolidated in the total consumption of fabricated structural products in any prescribed area are of little probative value in ascertaining the extent to which consumers of these products would be injured through elimination of competition between the two companies.

[11] *10 largest structural steel fabricators in the 11 Western States, 1946.*

Company	Location	Bookings (net tons)	Percent of total
All companies		336,717	100.0
United States Steel Corp	Pittsburgh, Pa	44,083	12.9
Consolidated Steel Corp	Los Angeles, Calif	36,142	10.6
Bethlehem Steel Co	Bethlehem, Pa	36,047	10.6
Mosher Steel Co	Houston, Tex	29,814	8.7
Chicago Bridge & Iron Co	Chicago, Ill	21,588	6.3
Isaacson Iron Works	Seattle, Wash	10,656	3.1
Kansas City Structural Co	Kansas City, Kans	10,051	2.9
Midwest Steel & Iron Works Co	Denver, Colo	9,306	2.7
Northwest Steel Rolling Mills, Inc	Seattle, Wash	9,000	2.6
Structural Steel & Forge Co	Salt Lake City, Utah	8,300	2.4
Total 10 companies		214,987	63.0
Remaining 80 companies		121,730	37.0

The table quoted includes a correction as to Consolidated's bookings which was made after the exhibit was introduced.

As in the case of rolled steel products, however, wartime developments have made prewar statistics of little relevance. The appellees urge three reasons why eastern fabricators will be at a competitive disadvantage with western fabricators for the western market: the availability of rolled steel products from the Geneva plant and other West Coast plants at a lower price, the increase in commercial freight rates on fabricated products, and the abolition of land grant rates. The increase in freight rates has made it less profitable for eastern fabricators to sell in the West, and the elimination of land grant rates on government shipments has made it less profitable for eastern fabricators to sell to government agencies in the West. Whatever competition may have existed in the past between Consolidated and the two bridge company subsidiaries of United States Steel, the appellees urge, will exist to a much lesser extent in the future.[12] Consequently, even though the government may be correct in claiming that the eleven-state area is the proper market for measuring competition with Consolidated, the government may not at the same time claim that prewar statistics as to United States Steel's share of that market are of major significance.

Apart from the question of the geographical size of the market, the appellees urge that the bookings for fabricated structural steel products are of little significance

[12] The trial court found that the fabricating subsidiaries of United States Steel would be eliminated from the West Coast market in the future except for specialized products which they are equipped to fabricate economically and which sell at higher prices per ton of product.

Since the record was made up in this case, United States Steel has announced that the mill price for Geneva steel products has been reduced $3 per ton, effective May 1, 1948. That amount represented the previously existing mill price differential of Geneva steel products over products produced at Pittsburgh, Chicago, Gary, and Birmingham. U. S. Steel Quarterly, Vol. 2, No. 2, May 1948, p. 6.

because Consolidated and United States Steel make different types of structural steel products. In view of the fact that structural steel jobs are fabricated on an individual basis, it is difficult to compare the output of United States Steel with that of Consolidated, but the appellees argue that in general Consolidated does only light and medium fabrication, whereas United States Steel does heavy fabrication. The appellees support their argument with an elaborate statistical analysis of bids by the two companies. Those figures show that Consolidated and United States Steel submitted bids for the same project in a very small number of instances.[13] Such figures are not conclusive of lack of competition; the government suggests that knowledge that one party has submitted a bid may discourage others from bidding. The government has introduced very little evidence, however, to show that in fact the types of structural steel products sold by Consolidated are similar to those sold by United States Steel. The appellees further urge that only a small proportion of Consolidated's business fell in the

[13] During the ten-year period ending in 1946 United States Steel bid on 2,409 jobs in the Consolidated area and was successful in 839. Consolidated bid on 6,377 jobs and was successful in 2,390. There were only 166 jobs, however, on which both companies bid. Forty of these jobs on which both companies bid were awarded to United States Steel, 35 were awarded to Consolidated, and 91 were awarded to competitors. Reducing these figures to a tonnage basis, United States Steel was awarded bids covering 499,605 tons out of a total tonnage on which bids were submitted of 1,273,152 tons. Consolidated bid on jobs involving 578,847 tons and was awarded 157,997 tons. The tonnage involved in the 166 common bids was 122,353 tons, of which United States Steel's share was 38,920, Consolidated's 24,162, and other competitors 59,271.

The above figures indicate that Consolidated customarily bid on lighter types of work; the average tonnage for Consolidated's bids was 90 tons, whereas the average tonnage for United States Steel was 528 tons. The 166 jobs on which both companies submitted bids were considerably larger in volume, averaging 737 tons.

category of structural steel products, and that as to plate fabrication and miscellaneous work there was no competition with United States Steel whatsoever. The trial court found on this issue that 16% of Consolidated's business was in structural steel products and 70% in plate fabrication. On the basis of the statistics here summarized, the trial court found that competition between the two companies in the manufacture and sale of fabricated structural steel products was not substantial.

The government also argues that competition will be eliminated between Consolidated and National Tube in the sale of pipe. In this field we have no difficulty in determining the geographical scope of the market to be considered in determining the extent of competition, since the government claims that Consolidated and National Tube compete on a nation-wide scale in the field of large diameter pipe for oil and gas pipelines. Other types of pipe made by the two concerns are apparently not competitive as the government does not contest this assertion of the appellees.[14] Consolidated in the past has special-

[14] The following extract from the record summarizes the evidence on this question:

"A. The type of pipe made by Consolidated is electric weld pipe known as fusion weld or arc weld pipe in sizes from 4-inch up to say 30-inch. We don't make any electric weld pipe. The pipe that Consolidated make other than the pipe larger than 26-inch is made primarily for and sold to the water works industry, and our pipe is sold primarily to the oil and gas industry. We don't make the same type of pipe, and the sizes which we manufacture and the gages and the lengths are in general quite different from those made by Consolidated Steel. They only overlap at a very small part of the field insofar as the physical dimensions of the pipe are concerned.

"Q. You have spoken of pipe made by Consolidated for water conveyance. Are those what have been referred to as penstocks?

"A. No, sir. Well, yes, to a certain extent penstocks, and many other types of low-pressure water pipe. It is true that penstocks are included in that as far as Consolidated is concerned. National

ized in comparatively light walled pipe for low pressure purposes, such as irrigation and water transmission, whereas National Tube has made a heavy walled pipe for high pressure purposes which is used chiefly in the oil and gas industry. National Tube pipe is substantially cheaper to produce. The record does show, however, that in the last few years Consolidated has supplied large diameter pipe for oil and gas pipelines on at least four occasions in three of which National Tube also supplied part of the pipe requirements.[15] Although the record does not show the extent of Consolidated's business in this field, one of the witnesses estimated that Consolidated's contract to furnish 90% of the pipe for the Trans-Arabian pipeline would run to almost $30,000,000. The appellees seek to minimize the importance of competition in this field by pointing out that the pipe to be used for the Trans-Arabian pipeline is 30 and 31 inches in diameter, which is too large a size to be made by the seamless process employed by National Tube. The record is barren on the

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Tube Company do not make any penstock pipe. They have not made any for ten years.

"Q. And none of what you term light-pressure pipe?

"A. We don't compete with that. We make high-pressure pipe only."

[15] Roach testified that the first order which Consolidated had filled for such pipe was for the Southern Counties and Southern California gas line, but he did not indicate the size or date of the order. The president of National Tube testified that Consolidated contracted in 1946 to furnish 100 miles of 26-inch pipe for the El Paso Natural Gas Co., National Tube contracted to supply 230 miles, and a third competitor 400 miles. The same witness also testified that National Tube contracted in 1946 to supply a small amount of 24-inch pipe to the Pacific Gas and Electric Co., and that Consolidated in 1947 also agreed to furnish a quantity of pipe for the same pipeline. As of November 30, 1946, Consolidated had unfilled orders for "heavy pipe" of $9,830,079, a figure which does not include the Pacific Gas and Electric or Trans-Arabian order.

comparative production between Consolidated and its competitors, other than United States Steel, in the manufacture of large pipe. The record does show that other major companies, not connected with any of the parties to this proceeding, do manufacture welded and seamless pipe.[16] The appellees further claim that under normal circumstances Consolidated and National Tube would not compete in this field because Consolidated pipe sells for $30 a ton more than National Tube pipe, and that Consolidated is able to sell its pipe only because of the inability of National Tube and other concerns to take on additional orders. The government argues in reply that Consolidated may be able to reduce its costs of production if a sufficiently large volume of orders is obtained, but no evidence is adduced to support such a conclusion.

The opinion of the trial court summarized the facts outlined above, and concluded that there was no substantial competition between National Tube and Consolidated in the sale of pipe; one of the findings went even further, stating that the two companies "do not compete" in the sale of their pipe products.

The trial court also concluded that the government had failed to prove that United States Steel had attempted to monopolize the business of fabricating steel products in the Consolidated market in violation of § 2. The trial judge apparently was of the opinion that since the purchase of Consolidated did not constitute a violation of § 1, it could not constitute a violation of § 2, since every attempt to monopolize must also constitute an illegal restraint. In his findings the trial judge concluded that the purchase agreement was entered into "for sound business reasons" and with no intent to monopolize the production and sale of fabricated steel products.

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[16] *E. g.*, Republic Steel Corp., A. O. Smith Corp., Youngstown Sheet and Tube Co. There are other producers in the West.

II.

In support of its position that the proposed contract violates § 1 of the Sherman Act, the government urges that all the legal conclusions of the district court were erroneous. It is argued that, without regard to the percentages of consumption of rolled steel products by Consolidated just considered, the acquisition by United States Steel of Consolidated violates the Sherman Act. Such an arrangement, it is claimed, excludes other producers of rolled steel products from the Consolidated market and constitutes an illegal restraint *per se* to which the rule of reason is inapplicable. Or, phrasing the argument differently, the government's contention seems to be that the acquisition of facilities which provide a controlled market for the output of the Geneva plant is a process of vertical integration and invalid *per se* under the Sherman Act. The acquisition of Consolidated, it is pointed out, would also eliminate competition between Consolidated and the subsidiaries of United States Steel in the sale of structural steel products and pipe products, and would eliminate potential competition from Consolidated in the sale of other steel products. We also note that the acquisition of Consolidated will bring United States Steel for the first time into the field of plate fabrication.

A. We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, we sustained the validity of a complaint which alleged that the defendants had monopolized the cab operating business in four large

cities.[17] It is the volume in the area which the alleged restraints affect that is important. In *United States* v. *Griffith*, 334 U. S. 100, we found restraint of trade by a chain of motion picture exhibitors covering a small area. Although our previous discussion has indicated the difficulties in accepting the eleven-state area in which Consolidated sells its products as the relevant competitive market, we accept for the purposes of decision the government's argument that this area is the one to be considered in measuring the effect on competition of the withdrawal of Consolidated as a market for other rolled steel producers and of the bringing together under common control of Consolidated and the fabricating subsidiaries of United States Steel.

B. The government relies heavily on *United States* v. *Yellow Cab Co., supra,* to support its argument that the withdrawal of Consolidated as a possible consumer for the

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[17] 332 U. S. at 226:

"Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.*, 293 U. S. 268, 279, 'The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.' It follows that the complaint in this case is not defective for failure to allege that CCM has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States. Its relative position in the field of cab production has no necessary relation to the ability of the appellees to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient."

goods of other rolled steel producers constitutes an illegal restraint. The complaint in the *Yellow Cab* case charged that there was a plan, an intent, to monopolize the cab business, from manufacture through operation in the four large cities, by acquiring cab operating companies or interests therein; tying those companies into a cab manufacturing company and requiring the operating companies to purchase their cabs from the manufacturer at a price above the prevailing market. There was no allegation that the volume of cab production which was thus excluded as a market for rival cab manufacturers was a substantial proportion of the total volume of cabs produced, and the government concludes that the case stands for the proposition that it is illegal *per se* for a manufacturer to preempt any market for his goods through vertical integration provided that an "appreciable" amount of interstate commerce is involved.[18]

We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor pro-

[18] The government relies particularly on the following excerpt, 332 U. S. at 226–27:

"Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act. . . . In addition, by preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce."

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ducers to market their rolled steel.[19] In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing,[20] or have concertedly refused to deal with non-members of an association,[21] or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device,[22] then the amount of commerce involved is immaterial because such restraints are illegal

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[19] The general language of §§ 1 and 2 of the Sherman Act has been construed as prohibiting only unreasonable restraints, not all possible restraints of trade. *Standard Oil Co.* v. *United States*, 221 U. S. 1. In this it differs somewhat from the more specific language of the Clayton Act, 38 Stat. 730, or the Federal Trade Commission Act, 38 Stat. 717. See *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 46, and *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356.

[20] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

[21] *Associated Press* v. *United States*, 326 U. S. 1; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600; *Montague & Co.* v. *Lowry*, 193 U. S. 38. See *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457.

[22] *International Salt Co.* v. *United States*, 332 U. S. 392.

per se. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se.*

A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists. That this is the teaching of the *Yellow Cab* case is indicated by the following quotation:

> "And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States* v. *Reading Co.*, 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred." 332 U. S. at 227–28.

That view is in accord with previous decisions of the Court.[23]

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[23] Compare our statement in *United States* v. *Paramount Pictures,* 334 U. S. 131, 173–174:

"Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of pro-

The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.

In *United States* v. *Paramount Pictures,* 334 U. S. 131, we were presented with a situation in which the government charged that vertical integration was illegal under the Sherman Act. We held that control by the major producer-distributors over nearly three-quarters of the first-run theaters in cities with population over 100,000 was not of itself illegal, and we remanded the case to the district court for further findings. In outlining the factors which we considered to be significant in determining the legality of vertical integration, we emphasized the importance of characterizing the nature of the market to be served, and the leverage on the market which the particular vertical integration creates or makes possible. A second test which we considered important in the

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ducing, distributing and exhibiting motion pictures is illegal *per se.* But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs."

The legality of contractual arrangements for exclusive dealing was sustained in *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 728–29. Compare *Federal Trade Comm'n* v. *Curtis Publishing Co.,* 260 U. S. 568.

Paramount case was the purpose or intent with which the combination was conceived. When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act. Compare *United States* v. *Griffith,* 334 U. S. 100, 105.[24]

It seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act. It is an indefinite term without explicit meaning. Even in the iron industry, where could a line be drawn—at the end of mining the ore, the production of the pig-iron or steel ingots, when the rolling mill

[24] *Id.*, pp. 106–107:

"Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 61. But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade. Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809, 811, 814."

operation is completed, fabrication on order or at some stage of manufacture into standard merchandise? No answer would be possible and therefore the extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases. Technological advances may easily require a basic industry plant to expand its processes into semi-finished or finished goods so as to produce desired articles in greater volume and with less expense.

It is not for courts to determine the course of the Nation's economic development. Economists may recommend, the legislative and executive branches may chart legal courses by which the competitive forces of business can seek to reduce costs and increase production so that a higher standard of living may be available to all. The evils and dangers of monopoly and attempts to monopolize that grow out of size and efforts to eliminate others from markets, large or small, have caused Congress and the Executive to regulate commerce and trade in many respects. But no direction has appeared of a public policy that forbids, *per se,* an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nation-wide or county-wide. On the other hand, the courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed. The basic industries, with few exceptions, do not approach in America a cartelized form. If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts.

Applying the standards laid down in the *Paramount* case, we conclude that the so-called vertical integration

resulting from the acquisition of Consolidated does not unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product. We accept as the relevant competitive market the total demand for rolled steel products in the eleven-state area; over the past ten years Consolidated has accounted for only 3% of that demand, and if expectations as to the development of the western steel industry are realized, Consolidated's proportion may be expected to be lower than that figure in the future. Nor can we find a specific intent in the present case to accomplish an unreasonable restraint, for reasons which we discuss under heading III of this opinion.

C. We turn now to a discussion of the significance, as to possible violation of the Sherman Act, of the fact that Consolidated has been a competitor of United States Steel in structural steel fabrication and in the manufacture of pipe. The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a

competitor.[25] The relative effect of percentage command of a market varies with the setting in which that factor is placed.

The United States makes the point that the acquisition of Consolidated would preclude and restrain substantial potential competition in the production and sale of other steel products than fabricated structural steel and pipe. Force is added to this contention by the fact, adverted to above at pages 500 and 512, that United States Steel does no plate fabrication while Consolidated does. By plate fabrication Consolidated produces many articles not now produced by United States Steel. We mention, as examples, boilers, gas tanks, smoke stacks, storage tanks and barges. Attention is also called to the war activities of Consolidated in steel shipbuilding as indicative of its potentialities as a competitor. We have noted, pp. 500–501, *supra,* that this construction was under government direction and financing. We agree that any acquisition of fabricating equipment eliminates some potential competition from anyone who might own or acquire such facilities. We agree, too, with the government's position that potential competition from producers of presently non-competitive articles as well as the possibility that acquired facilities may be used in the future for the production of new articles in competition with others may be taken into consideration in weighing the effect of any acquisition of assets on restraint of trade.[26]

The government's argument, however, takes us into highly speculative situations. Steel ship construction for war purposes was an enterprise undertaken at government

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[25] Compare *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 424; Handler, *supra,* note 7, tables, p. 245. See also Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. of Chicago L. Rev. 567, 575–86.

[26] *United States v. Southern Pacific Co.,* 259 U. S. 214; *United States* v. *Reading Co.,* 253 U. S. 26.

expense. We know of nothing from the record that would lead Consolidated or United States Steel to branch out into the peace-time steel ship industry at their own risk. The necessary yards have been sold. It is true that United States Steel might go into plate fabrication. The record shows nothing as to production or demand in the Consolidated trade area for plate fabricated articles. Nothing appears as to the number of producers of such goods in that territory. What we have said in other places in this opinion as to the growing steel industry in this area is pertinent here. Eastern fabricators will find it difficult to meet competition from western fabricators in the western market. Cheaper western rolled steel and freight rates are a handicap to eastern fabricators. Looking at the situation here presented, we are unwilling to hold that possibilities of interference with future competition are serious enough to justify us in declaring that this contract will bring about unlawful restraint.

We conclude that in this case the government has failed to prove that the elimination of competition between Consolidated and the structural fabricating subsidiaries of United States Steel constitutes an unreasonable restraint. If we make the doubtful assumption that United States Steel could be expected in the future to sell 13% of the total of structural steel products in the Consolidated trade area and that Consolidated could be expected to sell 11%, we conclude that where we have the present unusual conditions of the western steel industry and in view of the facts of this case as developed at pages 512 to 516, of this opinion, it can not be said there would be an unreasonable restraint of trade. To hold this does not imply that additional acquisitions of fabricating facilities for structural steel would not become monopolistic. Notwithstanding some differences as to the business of Consolidated and United States Steel in respect to the character of structural steel products fabricated by each, there is

competition between the two for both light and heavy work. The western steel industry is developing. Fontana and Geneva as well as other producers are making available for fabricators larger supplies of rolled steel so that the West is becoming less dependent on eastern suppliers. We are of the opinion, moreover, in view of the number of West Coast fabricators (see pp. 502–503) and the ability of out-of-the-area fabricators to compete because of the specialized character of structural steel production in regard to orders and designs, that this acquisition is permissible.

We likewise conclude that the elimination of competition between Consolidated and National Tube (a United States Steel subsidiary) does not constitute an unreasonable restraint. Competition at the time of the contract was restricted to the sale of large diameter pipe for oil and gas pipelines, see pages 516 to 518, *supra,* and the only indication in the record that competition in pipe would exist in a broader field in the future is contained in the suggestion, without proof or specification, that Consolidated through technological advances or business expansion, might produce a wider range of pipe sizes and types. This is not enough to persuade us that the purchase will unduly restrain trade in pipe. The record does show that in three instances Consolidated and National Tube each supplied pipe for a new pipeline. It is clear that these line pipe contracts were obtained by Consolidated in a seller's market. We are given nothing as to the national production of oil and gas trunkline pipe or the relation of the pipe sold by Consolidated and National Tube to this production. The government does not contest appellees' statement that Consolidated pipe for this purpose is substantially more expensive than seamless pipe, and in the absence of a showing that welded pipe has advantages over seamless pipe to compensate for the increased cost or that Consolidated's production costs may be expected

to decline with an increase in volume, it does not seem to us that it has been shown that competition in this field between the parties to this contract is so substantial that its elimination under these circumstances constitutes an unreasonable restraint.

The government cites four antitrust cases involving railroads to support its argument that control by one competitor over another violates the Sherman Act, even though the percentage of business for which they compete may be small.[27] The appellees cite cases from this Court and lower courts in which acquisition by one competitor of another was held not to violate the antitrust laws.[28] We do not stop to examine those cases to determine whether we would now approve either their language or their holdings. The factual situation in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief requested by the government.[29]

III.

We turn last to the allegation of the government that United States Steel has attempted to monopolize the production and sale of fabricated steel products in the Consolidated market. We think that the trial court applied too narrow a test to this charge; even though

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[27] *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *Northern Securities Co.* v. *United States*, 193 U. S. 197.

[28] *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291; *United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32; *United States* v. *Standard Oil Co. of New Jersey*, 47 F. 2d 288; *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117.

[29] See Handler, *supra*, note 7, at 269–71.

the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown.[30] To show that specific intent, the government recites the long history of acquisitions of United States Steel, and argues that the present acquisition when viewed in the light of that history demonstrates the existence of a specific intent to monopolize. Although this Court held in 1920 [31] that United States Steel had not violated § 2 through the acquisition of 180 formerly independent concerns, we may look to those acquisitions as well as to the eight acquisitions from 1924 to 1943 to determine the intent of United States Steel in acquiring Consolidated.

We look not only to those acquisitions, however, but also to the latest acquisition—the government-owned plant at Geneva. We think that last acquisition is of significance in ascertaining the intent of United States Steel in acquiring Consolidated.[32] The bid of United States Steel for the Geneva plant emphasized the importance of erecting finishing facilities to assure a market for Geneva's production, and we think it a fact of weight that many of the other bids were conditioned upon the government lending money or making grants for erecting such facilities at no cost to the bidder. No objection was interposed when United States Steel indicated that it proposed to spend $25,000,000 to erect a cold reduction mill at Pittsburg, and it is doubtful whether objections could be raised if United States Steel proposed to build instead of to buy from a competitor fabricating facilities similar to those possessed by Consolidated. The reasons given by Consolidated and United States Steel for the purchase and sale of the assets here involved seem not to involve

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[30] *United States* v. *Griffith*, *supra*, note 24.

[31] *United States* v. *United States Steel Corp.*, 251 U. S. 417.

[32] *Id.*, at 446.

any action condemned by the Sherman Act. Granting that the sale will to some extent affect competition, the acquisition of a firm outlet to absorb a portion of Geneva's rolled steel production seems to reflect a normal business purpose rather than a scheme to circumvent the law. United States Steel, despite its large sales, many acquisitions and leading position in the industry, has declined in the proportion of rolled steel products it manufactures in comparison with its early days. In 1901 it produced 50.1%; in 1911, 45.7%; in 1946, 30.4%.[33] For the period 1937–1946, it produced 33.2%.[34] Its size is impressive. Size has significance also in an appraisal of alleged violations of the Sherman Act. But the steel industry is also of impressive size and the welcome westward extension of that industry requires that the existing companies go into production there or abandon that market to other organizations.

We have dealt with the objections to this purchase because of the exclusion of other rolled steel producers from supplying Consolidated's demand for that product and because of the alleged restraint of trade involved in the extension of United States Steel's fabricating and pipe commerce. It has been necessary to treat these arguments separately so as to isolate the facts and figures which convince us that these objections do not rise to the level of proving a violation of law. It only need be added that we have also considered the various items of objection in the aggregate and in the light of the charge of

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[33] The figures for 1901 and 1911 are taken from *United States* v. *United States Steel Corp.*, 223 Fed. 55, 67.

[34] The record includes an unchallenged table showing the proportion of total national production of steel ingots and steel for casting attributable to United States Steel from 1901 through 1946. It is taken from the statistical reports of the American Iron and Steel Institute and United States Steel. It may be summarized by saying it shows an irregular reduction from over 60% to less than 33-1/3%.

intent to monopolize. But even from that point of view, the government has not persuaded us that the proposed contract violates our public policy as stated in the Sherman Act.

The judgment of the District Court is affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur, dissenting.

This is the most important antitrust case which has been before the Court in years. It is important because it reveals the way of growth of monopoly power—the precise phenomenon at which the Sherman Act was aimed. Here we have the pattern of the evolution of the great trusts. Little, independent units are gobbled up by bigger ones. At times the independent is driven to the wall and surrenders. At other times any number of "sound business reasons" appear why the sale to or merger with the trust should be made.[1] If the acqui-

[1] The most frequent reasons given for mergers are that they prevent waste and promote efficiency, reduce overhead, dilute sales and advertising costs, spread risks, etc. Compare, New Mergers, New Motives, Business Week, Nov. 10, 1945, p. 68; Growth of Business Units: Effect of War and Shortages, United States News, May 10, 1946, p. 48. But that these advantages are largely illusory has long been recognized. See, *e. g.*, Relative Efficiency of Large, Medium-sized, and Small Business (TNEC Monograph 13, 1941) pp. 111, 128, 132, 398. The theory was never more forcefully exploded than by Brandeis in The Curse of Bigness:

"The only argument that has been seriously advanced in favor of private monopoly is that competition involves waste, while the monopoly prevents waste and leads to efficiency. This argument is essentially unsound. The wastes of competition are negligible. The economies of monopoly are superficial and delusive. The efficiency of monopoly is at the best temporary.

"Undoubtedly competition involves waste. What human activity does not? The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh

sition were the result of predatory practices or restraints of trade, the trust could be required to disgorge. *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110. But the impact on future competition and on the economy is the same though the trust was built in more gentlemanly ways.

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—

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that waste and make it more efficient than absolutism. So it is with competition. The waste is relatively insignificant. There are wastes of competition which do not develop, but kill. These the law can and should eliminate, by regulating competition.

"It is true that the unit in business may be too small to be efficient. It is also true that the unit may be too large to be efficient, and this is no uncommon incident of monopoly." P. 105.

". . . no monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the processes of manufacture or of distribution as to enable it to control the market solely by reason of its superiority." P. 114–15.

"The Steel Trust, while apparently free from the coarser forms of suppressing competition, acquired control of the market not through greater efficiency, but by buying up existing plants and particularly ore supplies at fabulous prices, and by controlling strategic transportation systems." P. 115.

"But the efficiency of monopolies, even if established, would not justify their existence unless the community should reap benefit from the efficiency; experience teaches us that whenever trusts have developed efficiency, their fruits have been absorbed almost wholly by the trusts themselves. From such efficiency as they have developed the community has gained substantially nothing. For instance: . . . *The Steel Trust,* a corporation of reputed efficiency. The high prices maintained by it in the industry are matters of common knowledge. In less than ten years it accumulated for its shareholders or paid out as dividends on stock representing merely water, over $650,000,000." Pp. 120–121.

because of its control of prices.[2] Control of prices in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression—an economy of abundance or scarcity. Size in steel should therefore be jealously watched.[3] In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

The Court forgot this lesson in *United States* v. *United States Steel Corp.*, 251 U. S. 417, and in *United States* v.

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[2] See Relative Efficiency of Large, Medium-sized, and Small Business (TNEC Monograph 13, 1941) p. 132.

[3] In 1911 when the original antitrust suit against United States Steel was instituted, the company had already absorbed 180 formerly independent concerns. See *United States* v. *United States Steel Corp.*, 223 F. 55, 162. Since then it has absorbed at least 8 additional independent companies, including Columbia which prior to 1930 was operated by an independent producer and maintained the only integrated steel operation west of the Rockies.

International Harvester Co., 274 U. S. 693. The Court today forgets it when it allows United States Steel to wrap its tentacles tighter around the steel industry of the West.

This acquisition can be dressed up (perhaps legitimately) in terms of an expansion to meet the demands of a business which is growing as a result of superior and enterprising management.[4] But the test under the Sherman Act strikes deeper. However the acquisition may be rationalized, the effect is plain. It is a purchase for control, a purchase for control of a market for which United States Steel has in the past had to compete but which it no longer wants left to the uncertainties that competition in the West may engender. This in effect it concedes. It states that its purpose in acquiring Consolidated is to insure itself of a market for part of Geneva's production of rolled steel products when demand falls off.

But competition is never more irrevocably eliminated than by buying the customer for whose business the industry has been competing. The business of Consolidated amounts to around $22,000,000 annually. The competitive purchases by Consolidated are over $5,000,000 a year. I do not see how it is possible to say that $5,000,000 of commerce is immaterial. It plainly is not *de minimis*. And it is the character of the restraint which § 1 of the Act brands as illegal, not the amount of commerce affected. *Montague & Co.* v. *Lowry*, 193 U. S. 38; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225. At least it can be said here, as it was in *International Salt Co.* v. *United States*, 332 U. S. 392, 396, that the volume of business restrained by this contract is not insignificant or insubstantial. United States Steel does not consider

[4] See note 1, *supra*.

it insignificant, for the aim of this well-conceived project is to monopolize it. If it is not insubstantial as a market for United States Steel, it certainly is not from the point of view of the struggling western units of the steel industry.

It is unrealistic to measure Consolidated's part of the market by determining its proportion of the national market. There is no safeguarding of competition in the theory that the bigger the national market the less protection will be given those selling to the smaller components thereof. That theory would allow a producer to absorb outlets upon which small enterprises with restricted marketing facilities depend. Those outlets, though statistically unimportant from the point of view of the national market, could be a matter of life and death to small, local enterprises.

The largest market which must be taken for comparison is the market actually reached by the company which is being absorbed. In this case Consolidated's purchases of rolled steel products are a little over 3 per cent of that market. By no standard—United States Steel's or its western competitors—can that percentage be deemed immaterial. Yet consideration of the case from that viewpoint puts the public interest phase of the acquisition in the least favorable light. A surer test of the impact of the acquisition on competition is to be determined not only by consideration of the actual markets reached by Consolidated but also by the actual purchases which it makes. Its purchases were predominantly of plates and shapes—76 per cent from 1937–1941. This was in 1937 13 per cent of the total in the Consolidated market. That comparison is rejected by the Court or at least discounted on the theory that competitors presently selling to Consolidated can probably convert from plates and shapes to other forms of rolled steel products. But a surer test of the effect on competition is the actual business of which

competitors will be deprived. We do not know whether they can be sufficiently resourceful to recover from this strengthening of the hold which this giant of the industry now has on their markets. It would be more in keeping with the spirit of the Sherman Act to give the benefits of any doubts to the struggling competitors.

It is, of course, immaterial that a purpose or intent to achieve the result may not have been present. The holding of the cases from *United States* v. *Patten,* 226 U. S. 525, 543, to *United States* v. *Griffith,* 334 U. S. 100, is that the requisite purpose or intent is present if monopoly or restraint of trade results as a direct and necessary consequence of what was done. We need not hold that vertical integration is *per se* unlawful in order to strike down what is accomplished here. The consequence of the deliberate, calculated purchase for purpose of control over this substantial share of the market can no more be avoided here than it was in *United States* v. *Reading Co.,* 253 U. S. 26, 57, and in *United States* v. *Yellow Cab Co., supra.* I do not stop to consider the effect of the acquisition on competition in the sale of fabricated steel products. The monopoly of this substantial market for rolled steel products is in itself an unreasonable restraint of trade under § 1 of the Act.

The result might well be different if Consolidated were merging with or being acquired by an independent West Coast producer for the purpose of developing an integrated operation. The purchase might then be part of an intensely practical plan to put together an independent western unit of the industry with sufficient resources and strength to compete with the giants of the industry. Approval of this acquisition works in precisely the opposite direction. It makes dim the prospects that the western steel industry will be free from the control of the eastern giants. United States Steel, now that it owns the Geneva plant, has over 51 per cent of the rolled steel

or ingot capacity of the Pacific Coast area. This acquisition gives it unquestioned domination there and protects it against growth of the independents in that developing region. That alone is sufficient to condemn the purchase. Its serious impact on competition and the economy is emphasized when it is recalled that United States Steel has one-third of the rolled steel production of the entire country.[5] The least I can say is that a company that has that tremendous leverage on our economy is big enough.[6]

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[5] See note 8 of the Court's opinion.

[6] "United States Steel is the giant of the industry. Its manufacturing capacity is 'greater than that of all German producers combined. It is more than twice that of the entire British steel industry and more than twice that of all the French mills combined.' In addition to its facilities for producing pig iron, steel ingots, and all forms of finished and semifinished steel products, the corporation owned and operated through some 150 subsidiaries, in 1937, nearly 2,000 oil and natural gas wells, 89 iron ore mines, 79 coal mines, some 40 limestone, dolomite, cement rock, and clay quarries, a number of gypsum and fluorspar mines, 2 zinc mines, a manganese ore mine in Brazil, over 5,000 coking ovens, several water-supply systems with reservoirs, filtration plants, and pumping stations, over 100 ocean, lake, and river steamers, 500 barges and tugs, railroads, fire brick plants, and mills producing 12,000,000 barrels of cement. By virtue of its tremendous size and its high degree of integration, the corporation is in a position to dominate the field." Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1940) p. 120.

ESTIN *v.* ESTIN.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 139. Argued February 2–3, 1948.—Decided June 7, 1948.

While both spouses were domiciled in New York, a wife obtained a decree of separation and alimony there. Later the husband obtained a Nevada divorce in a proceeding in which the wife was notified constructively and entered no appearance. He stopped paying alimony and the wife sued in New York for the amount in arrears. The husband appeared and defended on the ground of the Nevada divorce. The New York court sustained the validity of the divorce, but granted the wife judgment for the arrears of alimony. The highest court of New York affirmed. *Held:* The New York judgment did not deny full faith and credit to the Nevada decree. Pp. 542–549.

(a) Notwithstanding any earlier holdings in New York to the contrary, the holding of the highest court of New York that the award of alimony survived the divorce under New York law, is binding on this Court—unless it conflicts with the Full Faith and Credit Clause. P. 544.

(b) The fact that the marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected. Pp. 544–545.

(c) That the requirements of full faith and credit are exacting, so far as judgments are concerned, does not mean that the state of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship. Pp. 545–546.

(d) Nevada could not adjudicate rights of the wife under the New York judgment when she was not personally served and did not appear in the Nevada proceeding. Pp. 546–549.

(e) Since Nevada had no power to adjudicate the wife's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. P. 549.

296 N. Y. 308, 73 N. E. 2d 113, affirmed.

Notwithstanding a divorce obtained by a husband in Nevada, a New York court gave the wife a judgment for arrears of alimony awarded under an earlier decree

granted while both spouses were domiciled in New York. 63 N. Y. S. 2d 476. The Appellate Division and the Court of Appeals affirmed. 271 App. Div. 829, 66 N. Y. S. 2d 421; 296 N. Y. 308, 73 N. E. 2d 113. This Court granted certiorari. 332 U. S. 840. *Affirmed*, p. 549.

James G. Purdy argued the cause for petitioner. With him on the brief was *Abraham J. Nydick*.

Roy Guthman argued the cause and filed a brief for respondent.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

This case, here on certiorari to the Court of Appeals of New York, presents an important question under the Full Faith and Credit Clause of the Constitution.[1] Article IV, § 1. It is whether a New York decree awarding respondent $180 per month for her maintenance and support in a separation proceeding survived a Nevada divorce decree which subsequently was granted petitioner.

The parties were married in 1937 and lived together in New York until 1942 when the husband left the wife. There was no issue of the marriage. In 1943 she brought an action against him for a separation. He entered a general appearance. The court, finding that he had abandoned her, granted her a decree of separation and awarded

[1] That clause directs that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" and provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." By the Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U. S. C. § 687, Congress provided that the "records and judicial proceedings" of the courts of any State "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken."

her $180 per month as permanent alimony. In January 1944 he went to Nevada where in 1945 he instituted an action for divorce. She was notified of the action by constructive service but entered no appearance in it. In May, 1945, the Nevada court, finding that petitioner had been a bona fide resident of Nevada since January 30, 1944, granted him an absolute divorce "on the ground of three years continual separation, without cohabitation." The Nevada decree made no provision for alimony, though the Nevada court had been advised of the New York decree.

Prior to that time petitioner had made payments of alimony under the New York decree. After entry of the Nevada decree he ceased paying. Thereupon respondent sued in New York for a supplementary judgment for the amount of the arrears. Petitioner appeared in the action and moved to eliminate the alimony provisions of the separation decree by reason of the Nevada decree. The Supreme Court denied the motion and granted respondent judgment for the arrears. 63 N. Y. S. 2d 476. The judgment was affirmed by the Appellate Division, 271 App. Div. 829, 66 N. Y. S. 2d 421, and then by the Court of Appeals. 296 N. Y. 308, 73 N. E. 2d 113.

We held in *Williams* v. *North Carolina,* 317 U. S. 287; 325 U. S. 226, (1) that a divorce decree granted by a State to one of its domiciliaries is entitled to full faith and credit in a bigamy prosecution brought in another State, even though the other spouse was given notice of the divorce proceeding only through constructive service; and (2) that while the finding of domicile by the court that granted the decree is entitled to *prima facie* weight, it is not conclusive in a sister State but might be relitigated there. And see *Esenwein* v. *Esenwein,* 325 U. S. 279. The latter course was followed in this case, as a consequence of which the Supreme Court of New York found, in accord with the Nevada court, that petitioner

"is now and since January, 1944, has been a bona fide resident of the State of Nevada."

Petitioner's argument therefore is that the tail must go with the hide—that since by the Nevada decree, recognized in New York, he and respondent are no longer husband and wife, no legal incidence of the marriage remains. We are given a detailed analysis of New York law to show that the New York courts have no power either by statute or by common law to compel a man to support his ex-wife, that alimony is payable only so long as the relation of husband and wife exists, and that in New York, as in some other states, see *Esenwein* v. *Esenwein, supra,* p. 280, a support order does not survive divorce.

The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. That conclusion is binding on us, except as it conflicts with the Full Faith and Credit Clause. It is not for us to say whether that ruling squares with what the New York courts said on earlier occasions. It is enough that New York today says that such is her policy. The only question for us is whether New York is powerless to make such a ruling in view of the Nevada decree.

We can put to one side the case where the wife was personally served or where she appeared in the divorce proceedings. Cf. *Yarborough* v. *Yarborough,* 290 U. S. 202; *Davis* v. *Davis,* 305 U. S. 32; *Sherrer* v. *Sherrer, ante,* p. 343; *Coe* v. *Coe, ante,* p. 378. The only service on her in this case was by publication and she made no appearance in the Nevada proceeding. The requirements of procedural due process were satisfied and the domicile of the husband in Nevada was foundation for a decree effecting a change in the marital capacity of both parties in all the other States of the Union, as well as in Nevada.

Williams v. *North Carolina,* 317 U. S. 287. But the fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected.

Although the point was not adjudicated in *Barber* v. *Barber,* 21 How. 582, 588, the Court in that case recognized that while a divorce decree obtained in Wisconsin by a husband from his absent wife might dissolve the *vinculum* of the marriage, it did not mean that he was freed from payment of alimony under an earlier separation decree granted by New York. An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree. That is true of the present problem under the Full Faith and Credit Clause.[2] The question involves important considerations both of law and of policy which it is essential to state.

The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy, have been few and far between. See *Williams* v. *North Carolina,* 317 U. S. 287, 294–295; *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 438–439, and cases cited; *Sherrer* v. *Sherrer, supra.* The Full Faith and Credit Clause is not

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[2] See Bingham, In the Matter of Haddock v. Haddock, 21 Corn. L. Quart. 393; Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1; Holt, The Bones of Haddock v. Haddock, 41 Mich. L. Rev. 1013, 1034; Barnhard, Haddock Reversed—Harbinger of the Divisible Divorce, 31 Geo. L. J. 210; Cook, Is Haddock v. Haddock Overruled, 18 Ind. L. J. 165.

to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. *Williams* v. *North Carolina,* 317 U. S. 287, 301–302; *Sherrer* v. *Sherrer, supra.* It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it. The fact that the requirements of full faith and credit, so far as judgments are concerned,[3] are exacting, if not inexorable (*Sherrer* v. *Sherrer, supra*), does not mean, however, that the State of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship.[4]

Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws, as the bigamy prosecution in *Williams* v. *North Carolina* dramatically illustrates. The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation. For a person domiciled in one State should not be allowed to suffer the penalties of

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[3] As respects statutes, see the discussion in *Williams* v. *North Carolina,* 317 U. S. 287, 295–296.

[4] The case is unlike *Thompson* v. *Thompson,* 226 U. S. 551, where the wife by her conduct forfeited her right to alimony under the laws of the State of the matrimonial domicile where her husband obtained the divorce, and hence could not retain a judgment for maintenance subsequently obtained in another jurisdiction.

bigamy for living outside the State with the only one which the State of his domicile recognizes as his lawful wife. And children born of the only marriage which is lawful in the State of his domicile should not carry the stigma of bastardy when they move elsewhere. These are matters of legitimate concern to the State of the domicile. They entitle the State of the domicile to bring in the absent spouse through constructive service. In no other way could the State of the domicile have and maintain effective control of the marital status of its domiciliaries.

Those are the considerations that have long permitted the State of the matrimonial domicile to change the marital status of the parties by an *ex parte* divorce proceeding, *Thompson* v. *Thompson,* 226 U. S. 551, considerations which in the *Williams* cases we thought were equally applicable to any State in which one spouse had established a bona fide domicile. See 317 U. S. pp. 300–301. But those considerations have little relevancy here. In this case New York evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it. New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. The New York court, having jurisdiction over both parties, undertook to protect her by granting her a judgment of permanent alimony. Nevada, however, apparently follows the rule that dissolution of the marriage puts an end to a support order. See *Herrick* v. *Herrick,* 55 Nev. 59, 68, 25 P. 2d 378, 380. But the question is whether Nevada could under any circumstances adjudicate rights of respondent under the New York judgment when she was not personally served or did not appear in the proceeding.

Bassett v. *Bassett,* 141 F. 2d 954, held that Nevada could not.[5] We agree with that view.

The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. Cf. *Curry* v. *McCanless,* 307 U. S. 357, 366.

Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. It can, for example, levy a tax on its transfer by will (*Blackstone* v. *Miller,* 188 U. S. 189; *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174, 176–177), appropriate it through garnishment or attachment (*Chicago, R. I. & P. R. Co.* v. *Sturm,* 174 U. S. 710; see *Harris* v. *Balk,* 198 U. S. 215), collect it and administer it for the benefit of creditors. *Clark* v. *Williard,* 294 U. S. 211; *Fischer* v. *American United Ins. Co.,* 314 U. S. 549, 553. But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. *Pennoyer* v. *Neff,* 95 U. S. 714; *Hart* v. *Sansom,* 110 U. S. 151; *New York Life Ins. Co.* v. *Dunlevy,* 241 U. S. 518.

We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting

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[5] And see *Miller* v. *Miller,* 200 Iowa 1193, 206 N. W. 262.

her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee,* 311 U. S. 32, 40–41; *Williams* v. *North Carolina,* 325 U. S. 226, 229, and cases cited.

The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.

Since Nevada had no jurisdiction to alter respondent's rights in the New York judgment, we do not reach the further question whether in any event that judgment would be entitled to full faith and credit in Nevada. See *Sistare* v. *Sistare,* 218 U. S. 1; *Barber* v. *Barber,* 323 U. S. 77; *Griffin* v. *Griffin,* 327 U. S. 220. And it will be time enough to consider the effect of any discrimination shown to out-of-state *ex parte* divorces when a State makes that its policy.

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

The Court's opinion appears to rest on three independent grounds:

(1) New York may, consistently with the Full Faith and Credit Clause, hold that a prior separate maintenance decree of one of its courts survives a decree of divorce within the scope of enforceability of the rule in *Williams*

v. *North Carolina,* 317 U. S. 287, whether such divorce is granted in New York or by a sister State;

(2) By virtue of its interest in preventing its citizens from becoming public charges, New York may constitutionally provide that a domestic separate maintenance decree survives a sister-State divorce decree which must be respected in New York under the rule in the first *Williams* case, *supra*;

(3) A separate maintenance decree creates an obligation which may not, consistently with due process, be extinguished by a court lacking personal jurisdiction of the obligee, though possessed of jurisdiction to terminate her marital status, and any judgment purporting to do so is not entitled to extra-State recognition.

To the first of these grounds I assent, and if such is the law of New York I agree that the decision of the New York Court of Appeals in this case must be upheld. It is for New York to decide whether its decrees for separate maintenance survive divorce or terminate with it, provided, of course, that its decision is not a mere attempt to defeat a federal right, given by the Full Faith and Credit Clause, under the guise of a determination of State law. Cf. *Davis* v. *Wechsler,* 263 U. S. 22, 24–25.

The second ground presents difficulties. I cannot agree that New York's interest in its residents would justify New York in giving less effect to an enforceable Nevada divorce granted to one domiciled in Nevada, against a spouse not personally served, than it would give to a valid New York divorce similarly obtained. As to this, I agree with the views of my brother JACKSON. If, on the other hand, New York does not so discriminate against enforceable "ex parte" divorce decrees granted by a sister State, no problem under the Full Faith and Credit Clause arises.

Furthermore, if the respondent had obtained her separate maintenance decree in Pennsylvania—which treats such decrees as terminated by any valid divorce, see *Esenwein* v. *Esenwein,* 325 U. S. 279—and had subsequently moved to New York and there brought a suit based on the Pennsylvania decree, it is clear that New York's interest in preventing the respondent from becoming a public charge would not justify refusal to treat the separate maintenance decree as having been terminated. New York would be required to refer to the law of Pennsylvania to determine whether the maintenance decree of that Commonwealth had survived the Nevada divorce, and, finding that it had not, the New York courts could not enforce it.

My difficulty with the third ground of the Court's opinion is that Nevada did not purport, so far as the record discloses, to rule on the survival of the New York separate maintenance decree. Nevada merely established a change in status. It was for New York to determine the effect, with reference to its own law, of that change in status. If it was the law of New York that divorce put an end to its separate maintenance decree, the respondent's decree would have been terminated not by the Nevada divorce but by the consequences, under the New York law, of a change in status, even though brought about by Nevada. Similarly, Nevada could not adjudicate rights in New York realty, but, if New York law provided for dower, a Nevada divorce might or might not terminate a dower interest in New York realty depending on whether or not New York treated dower rights as extinguished by divorce.

If the Nevada decree, insofar as it affected the New York separate maintenance decree, were violative of due process, New York of course would not have to give effect to it. It could not do so even if it wished. If the Nevada

decree involved a violation of due process, there is an end of the matter and other complicated issues need not be considered! It would not matter whether New York had a special interest in preventing its residents from becoming public charges, or whether New York treated maintenance decrees as surviving a valid divorce.

Accordingly, the crucial issue, as I see it, is whether New York has held that *no* "ex parte" divorce decree could terminate a prior New York separate maintenance decree, or whether it has decided merely that no "ex parte" divorce decree of another State could. The opinion of the Court of Appeals leaves this crucial issue in doubt. The prior decisions of the New York courts do not dispel my doubts. Neither do the cases cited in the Court of Appeals' opinion, which, with the exception of *Wagster* v. *Wagster,* 193 Ark. 902, do not involve "ex parte" domestic divorces. New York may legitimately decline to allow any "ex parte" divorce to dissolve its prior separate maintenance decree, but it may not, consistently with *Williams* v. *North Carolina,* 317 U. S. 287, discriminate against a Nevada decree granted to one there domiciled, and afford it less effect than it gives to a decree of its own with similar jurisdictional foundation. I cannot be sure which it has done.

I am reinforced in these views by MR. JUSTICE JACKSON'S dissent. As a New York lawyer and the Justice assigned to the Second Circuit, he is presumably not without knowledge of New York law. The Court's opinion is written in a spirit of certitude that the New York law is contrary to that which MR. JUSTICE JACKSON assumes it to be. Thus, on the issue that I deem decisive of the question whether New York has given full faith and credit to the Nevada decree—namely, whether under New York's law divorce decrees based on publication terminate support—her law has thus far not spoken with ascertainable clarity. I would therefore remand the case to the New York Court of Appeals for clarification of its

rationale. ". . . It is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases." *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557.

MR. JUSTICE JACKSON, dissenting.

If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to the confusion. I think that this decision does just that.

These parties lived together in New York State during their entire married life. Courts of that State granted judgment of separation, with award of alimony to the wife, in October 1943. Three months later the husband journeyed to Nevada and in three more months began a divorce action. No process was served on the wife in Nevada; she was put on notice only by constructive service through publication in New York. Notified thus of what was going on, she was put to this choice: to go to Nevada and fight a battle, hopeless under Nevada laws, to keep her New York judgment, or to do nothing. She

did nothing, and the Nevada court granted the husband a divorce without requiring payment of alimony.

Now the question is whether the New York judgment of separation or the Nevada judgment of divorce controls the present obligation to pay alimony. The New York judgment of separation is based on the premise that the parties remain husband and wife, though estranged, and hence the obligation of support, incident to marriage, continues. The Nevada decree is based on the contrary premise that the marriage no longer exists and so obligations dependent on it have ceased.

The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from its incidental obligations. Assuming the judgment to be one which the Constitution requires to be recognized at all, I do not see how we can square this decision with the command that it be given *full* faith and credit. For reasons which I stated in dissenting in *Williams* v. *North Carolina,* 317 U. S. 287, I would not give standing under the clause to constructive service divorces obtained on short residence. But if we are to hold this divorce good, I do not see how it can be less good than a divorce would be if rendered by the courts of New York.

As I understand New York law, if, after a decree of separation and alimony, the husband had obtained a New York divorce against his wife, it would terminate her right to alimony. If the Nevada judgment is to have *full* faith and credit, I think it must have the same effect that a similar New York decree would have. I do not see how we can hold that it must be accepted for some purposes and not for others, that he is free of his former marriage but still may be jailed, as he may in New York, for not paying the maintenance of a woman whom the Court is compelled to consider as no longer his wife.

KREIGER *v.* KREIGER.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 371. Argued February 2–3, 1948.—Decided June 7, 1948.

While both spouses were domiciled in New York, a wife obtained a decree of separation and alimony there. Later the husband obtained a Nevada divorce in a proceeding in which the wife was notified constructively and entered no appearance. He stopped paying alimony and the wife sued in New York for the amount in arrears. The husband appeared and defended on the ground of the Nevada divorce. The New York court granted the wife judgment for the arrears of alimony. The highest court of New York affirmed. *Held:* The New York judgment did not deny full faith and credit to the Nevada decree, since Nevada had no power to adjudicate the wife's rights in the New York decree of alimony. See *Estin* v. *Estin, ante,* p. 541. Pp. 556–557.

297 N. Y. 530, 74 N. E. 2d 468, affirmed.

Notwithstanding a divorce obtained by a husband in Nevada, a New York court gave the wife a judgment for arrears of alimony awarded under an earlier decree granted while both spouses were domiciled in New York. The Appellate Division affirmed. 271 N. Y. App. Div. 872, 66 N. Y. S. 2d 798. The Court of Appeals affirmed. 297 N. Y. 530, 74 N. E. 2d 468. This Court granted certiorari. 332 U. S. 829. *Affirmed,* p. 557.

James G. Purdy argued the cause for petitioner. With him on the brief was *Abraham J. Nydick.*

Charles Rothenberg argued the cause and filed a brief for respondent.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

This is a companion case to *Estin* v. *Estin, ante,* p. 541, also here on certiorari to the Court of Appeals of New York.

The parties were married in New York in 1933 and lived there together until their separation in 1935. In 1940 respondent obtained a decree of separation in New York on grounds of abandonment. Petitioner appeared in the action; and respondent was awarded $60 a week alimony for the support of herself and their only child, whose custody she was given.

Petitioner thereafter went to Nevada where he continues to reside. He instituted divorce proceedings in that state in the fall of 1944. Constructive service was made on respondent who made no appearance in the Nevada proceedings. While they were pending, respondent obtained an order in New York purporting to enjoin petitioner from seeking a divorce and from remarrying. Petitioner was neither served with process in New York nor entered an appearance in the latter proceeding. The Nevada court, with knowledge of the injunction and the New York judgment for alimony, awarded petitioner an absolute divorce on grounds of three consecutive years of separation without cohabitation. The judgment made no provision for alimony. It did provide that petitioner was to support, maintain and educate the child, whose custody it purported to grant him, and as to which jurisdiction was reserved. Petitioner thereafter tendered $50 a month for the support of the child but ceased making payments under the New York decree.

Respondent thereupon brought suit on the New York judgment in a federal district court in Nevada. Without waiting the outcome of that litigation she obtained a judgment in New York for the amount of the arrears, petitioner appearing and unsuccessfully pleading his Nevada divorce as a defense. The judgment was affirmed by the Appellate Division, two judges dissenting. 271 N. Y. App. Div. 872, 66 N. Y. S. 2d 798. The Court of Appeals affirmed without opinion, 297 N. Y. 530, 74 N. E. 2d 468, but stated in its remittitur that its action was

based upon *Estin* v. *Estin,* 296 N. Y. 308, 73 N. E. 2d 113. Respondent does not attack the bona fides of petitioner's Nevada domicile.

For the reasons stated in *Estin* v. *Estin, ante,* p. 541, we hold that Nevada had no power to adjudicate respondent's rights in the New York judgment and thus New York was not required to bow to that provision of the Nevada decree. It is therefore unnecessary to pass upon New York's attempt to enjoin petitioner from securing a divorce or to reach the question whether the New York judgment was entitled to full faith and credit in the Nevada proceedings. No issue as to the custody of the child was raised either in the court below or in this Court. The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER dissents for the reasons stated in his dissenting opinion in *Estin* v. *Estin, ante,* p. 549.

MR. JUSTICE JACKSON dissents for the reasons set forth in his opinion in *Estin* v. *Estin, ante,* p. 553.

SAIA *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 504. Argued March 30, 1948.—Decided June 7, 1948.

A city ordinance forbidding the use of sound amplification devices in public places except with the permission of the Chief of Police and prescribing no standards for the exercise of his discretion is unconstitutional on its face, since it establishes a previous restraint on the right of free speech in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 558–562.

297 N. Y. 659, 76 N. E. 2d 323, reversed.

Appellant was convicted of violating a city ordinance forbidding the use of sound amplification devices except with the permission of the Chief of Police. The County Court and the New York Court of Appeals affirmed. 297 N. Y. 659, 76 N. E. 2d 323. On appeal to this Court, *reversed*, p. 562.

Hayden C. Covington argued the cause and filed a brief for appellant.

Alan V. Parker submitted on brief for appellee.

Opinion of the Court by Mr. Justice Douglas, announced by Mr. Justice Black.

This case presents the question of the validity under the Fourteenth Amendment of a penal ordinance of the City of Lockport, New York, which forbids the use of sound amplification devices except with permission of the Chief of Police.[1]

[1] The ordinance, insofar as pertinent, reads as follows:

"Section 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public

Appellant is a minister of the religious sect known as Jehovah's Witnesses. He obtained from the Chief of Police permission to use sound equipment, mounted atop his car, to amplify lectures on religious subjects. The lectures were given at a fixed place in a public park on designated Sundays. When this permit expired, he applied for another one but was refused on the ground that complaints had been made. Appellant nevertheless used his equipment as planned on four occasions, but without a permit. He was tried in Police Court for violations of the ordinance. It was undisputed that he used his equipment to amplify speeches in the park and that they were on religious subjects. Some witnesses testified that they were annoyed by the sound, though not by the content of the addresses; others were not disturbed by either. The court upheld the ordinance against the contention that it violated appellant's rights of freedom of speech, assembly, and worship under the Federal Constitution. Fines and jail sentences were imposed. His convictions were affirmed without opinion by the County Court for Niagara County and by the New York Court of Appeals, 297 N. Y. 659, 76 N. E. 2d 323. The case is here on appeal.

We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the

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places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises.

"Section 3. Exception. Public dissemination, through radio loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

Appellant's conduct was regarded throughout as falling within the types of activity enumerated in § 3. We take the ordinance as construed by the State courts.

right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in *Cantwell* v. *Connecticut,* 310 U. S. 296; *Lovell* v. *Griffin,* 303 U. S. 444; and *Hague* v. *C. I. O.,* 307 U. S. 496.

In the *Cantwell* case a license had to be obtained in order to distribute religious literature. What was religious was left to the discretion of a public official. We held that judicial review to rectify abuses in the licensing system did not save the ordinance from condemnation on the grounds of previous restraint. *Lovell* v. *Griffin, supra,* held void on its face an ordinance requiring a license for the distribution of literature. That ordinance, like the present one, was dressed in the garb of the control of a "nuisance." But the Court made short shrift of the argument, saying that approval of the licensing system would institute censorship "in its baldest form." In *Hague* v. *C. I. O., supra,* we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage." We held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs." 307 U. S. p. 516.

The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the

Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell* case, freedom of the press in the *Griffin* case, and freedom of speech and assembly in the *Hague* case.[2]

Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning?

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[2] *Cox* v. *New Hampshire,* 312 U. S. 569, 577–578, did not depart from the rule of these earlier cases but re-emphasized the vice of the type of ordinance we have here. *Davis* v. *Massachusetts,* 167 U. S. 43, was distinguished in the *Hague* case, 307 U. S. pp. 514–516, which likewise involved an ordinance regulating the use of public streets and parks. It was there said, "We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

We adhere to that view. Though the statement was that of only three Justices, it plainly indicated the route the majority followed, who on the merits did not consider the *Davis* case to be controlling.

Must he prove to the satisfaction of that official that his noise will not be annoying to people?

The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.

Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.

Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position. See *Marsh* v. *Alabama*, 326 U. S. 501, 509.

Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE REED and MR. JUSTICE BURTON concur, dissenting.

The appellant's loud-speakers blared forth in a small park in a small city.[1] The park was about 1,600 feet

[1] The last census gave the population of Lockport as 24,379.

long and from 250 to 400 feet wide. It was used primarily for recreation, containing benches, picnic and athletic facilities, and a children's wading pool and playground. Estimates of the range of the sound equipment varied from about 200 to 600 feet. The attention of a large fraction of the area of the park was thus commanded.

The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *Irvington,* 308 U. S. 147; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation, or quiet conversation, may be disturbed or precluded by noise beyond one's personal control.

Municipalities have conscientiously sought to deal with the new problems to which sound equipment has given rise and have devised various methods of control to make city life endurable. See McIntire and Rhyne, Radio and Municipal Regulations (National Institute of Municipal Law Officers, Report No. 62, 1940) pp. 28 *et seq.* Surely there is not a constitutional right to force unwilling people to listen. Cf. Otto, *Speech and Freedom of Speech,* in Freedom and Experience (Edited by Hook and Konvitz, 1947) 78, 83 *et seq.* And so I cannot agree that we must deny the right of a State to control these broadcasting devices so as to safeguard the rights of

others not to be assailed by intrusive noise but to be free to put their freedom of mind and attention to uses of their own choice.

Coming to the facts of the immediate situation, I cannot say that it was beyond constitutional limits to refuse a license to the appellant for the time and place requested. The State was entitled to authorize the local authorities of Lockport to determine that the well-being of those of its inhabitants who sought quiet and other pleasures that a park affords, outweighed the appellant's right to force his message upon them. Nor did it exceed the bounds of reason for the chief of police to base his decision refusing a license upon the fact that the manner in which the license had been used in the past was destructive of the enjoyment of the park by those for whom it was maintained. That people complained about an annoyance would seem to be a pretty solid basis in experience for not sanctioning its continuance.

Very different considerations come into play when the free exercise of religion is subjected to a licensing system whereby a minor official determines whether a cause is religious. This was the problem presented by *Cantwell* v. *Connecticut,* 310 U. S. 296, and of course we held that "Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." 310 U. S. at 305. To determine whether a cause is, or is not, "religious" opens up too wide a field of personal judgment to be left to the mere discretion of an official. As to the allowable range of judgment regarding the scope of "religion," see Judge Augustus N. Hand in *United States* v. *Kauten,* 133 F. 2d 703, 708. The matter before us is of quite a different order. It is not unconstitutional for a State to vest in a public official the determination of what is in effect a nuisance merely because

such authority may be outrageously misused by trying to stifle the expression of some undesired opinion under the meretricious cloak of a nuisance. Judicial remedies are available for such abuse of authority, and courts, including this Court, exist to enforce such remedies.

Even the power to limit the abuse of sound equipment may not be exercised with a partiality unrelated to the nuisance. But there is here no showing of either arbitrary action or discrimination. There is no basis for finding that noisemakers similar to appellant would have obtained a license for the time and place requested. Reference is found in the testimony to the use of loudspeakers for Lutheran services in a nearby ballfield. But the ballfield was outside the park in which appellant blared to his audience, and there is nothing in the record to show that the Lutherans could have used their amplifying equipment within the park, or that the appellant would have been denied permission to use such equipment in the ballfield. See *Lehon* v. *Atlanta,* 242 U. S. 53. State action cannot be found hypothetically unconstitutional. *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152.

The men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic. Our democracy presupposes the deliberative process as a condition of thought and of responsible choice by the electorate. To the Founding Fathers it would hardly seem a proof of progress in the development of our democracy that the blare of sound trucks must be treated as a necessary medium in the deliberative process. In any event, it would startle them to learn that the manner and extent of the control of the blare of the sound trucks by the States of the Union, when such control is not arbitrarily and discriminatorily

exercised, must satisfy what this Court thinks is the desirable scope and manner of exercising such control.

We are dealing with new technological devices and with attempts to control them in order to gain their benefits while maintaining the precious freedom of privacy. These attempts, being experimental, are bound to be tentative, and the views I have expressed are directed towards the circumstances of the immediate case. Suffice it to say that the limitations by New York upon the exercise of appellant's rights of utterance did not in my view exceed the accommodation between the conflicting interests which the State was here entitled to make in view of time and place and circumstances. See *Cox* v. *New Hampshire,* 312 U. S. 569.

MR. JUSTICE JACKSON, dissenting.

I dissent from this decision, which seems to me neither judicious nor sound and to endanger the great right of free speech by making it ridiculous and obnoxious, more than the ordinance in question menaces free speech by regulating use of loud-speakers. Let us state some facts which the Court omits:

The City of Lockport, New York, owns and maintains a public park of some 28 acres dedicated by deed to "Park purposes exclusively." The scene of action in this case is an area therein set apart for the people's recreation. The City has provided it with tables, benches, and fireplaces for picnic parties, a playground and wading pool for children, and facilities for such games as horseshoe pitching, bowling and baseball.

The appellant, one of Jehovah's Witnesses, contends, and the Court holds, that without the permission required by city ordinance he may set up a sound truck so as to flood this area with amplified lectures on religious subjects. It must be remembered that he demands even more than the right to speak and hold a meeting in this

area which is reserved for other and quite inconsistent purposes. He located his car, on which loud-speakers were mounted, either in the park itself, not open to vehicles, or in the street close by. The microphone for the speaker was located some little distance from the car and in the park, and electric wires were strung, in one or more instances apparently across the sidewalk, from the one to the other. So that what the Court is holding, is that the Constitution of the United States forbids a city to require a permit for a private person to erect, in its streets, parks and public places, a temporary public address system, which certainly has potentialities of annoyance and even injury to park patrons if carelessly handled. It was for setting up this system of microphone, wires and sound truck without a permit, that this appellant was convicted—it was not for speaking.

It is astonishing news to me if the Constitution prohibits a municipality from policing, controlling or forbidding erection of such equipment by a private party in a public park. Certainly precautions against annoyance or injury from operation of such devices are not only appropriate, but I should think a duty of the city in supervising such public premises. And a very appropriate means to supervision is a permit which will inform the city's police officers of the time and place when such apparatus is to be installed in the park. I think it is a startling perversion of the Constitution to say that it wrests away from the states and their subdivisions all control of the public property so that they cannot regulate or prohibit the irresponsible introduction of contrivances of this sort into public places.

The Court, however, ignores the aspects of the matter that grow out of setting up the system of amplifying appliances, wires and microphones on public property, which distinguish it from the cases cited as authority.

It treats the issue only as one of free speech. To my mind this is not a free speech issue.[1] Lockport has in no way denied or restricted the free use, even in its park, of all of the facilities for speech with which nature has endowed the appellant. It has not even interfered with his inviting an assemblage in a park space not set aside for that purpose.[2] But can it be that society

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[1] More than fifty years ago this Court in *Davis* v. *Massachusetts*, 167 U. S. 43, affirmed a state court decision (162 Mass. 510) written by Mr. Justice Holmes and holding constitutional an ordinance providing that "no person shall, in or upon any of the public grounds, make any public address . . . except in accordance with a permit from the mayor." Mr. Justice Holmes had pointed out that the attack on the ordinance's constitutionality "assumes that the ordinance is directed against free speech generally, . . . whereas in fact it is directed toward the modes in which Boston Common may be used." That case, directly in point here, and approving a regulation of the right of speech itself, certainly controls this one, which involves only regulation of the use of amplifying devices, and, as applied to this appellant, forbade only unauthorized use in a park dedicated exclusively to park purposes. Moreover, the *Davis* case approved the requirement that a permit be obtained from a city official before "any public address" could be made "in or upon any of the public grounds."

The *Davis* case was not overruled in the cases cited by the Court. And all of those cases were considered and distinguished in *Cox* v. *New Hampshire*, 312 U. S. 569, written by Mr. Chief Justice Hughes for a unanimous Court, and which approved regulation and licensing of parades and processions in public streets even for admittedly religious purposes.

The case of *Hague* v. *C. I. O.*, 307 U. S. 496, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority.

[2] Nothing in the ordinance interferes with freedom of religion, freedom of assembly or freedom of the press. Indeed, the effect of § 3, which the Court summarily strikes down as void on its face, is to authorize the Chief of Police to permit use of "radio devices,

has no control of apparatus which, when put to unregulated proselyting, propaganda and commercial uses, can render life unbearable? It is intimated that the City can control the decibels; if so, why may it not prescribe zero decibels as appropriate to some places? It seems to me that society has the right to control, as to place, time and volume, the use of loud-speaking devices for any purpose, provided its regulations are not unduly arbitrary, capricious or discriminatory.

But the Court points out that propagation of his religion is the avowed and only purpose of appellant and holds that Lockport cannot stop the use of loud-speaker systems on its public property for that purpose. If it is to be treated as a case merely of religious teaching, I still could not agree with the decision. Only a few weeks ago we held that the Constitution prohibits a state or municipality from using tax-supported property "to aid religious groups to spread their faith." *McCollum* v. *Board of Education,* 333 U. S. 203. Today we say it compels them to let it be used for that purpose. In the one case the public property was appropriated to school uses; today it is public property appropriated and equipped for recreational purposes. I think Lockport had the right to allocate its public property to those purposes and to keep out of it installations of devices which would flood the area with religious appeals obnoxious to many and thereby deprive the public of the enjoyment of the property for the purposes for which it was properly set aside. And I cannot see

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mechanical devices, or loud speakers" where the subject matter is "news and matters of public concern and athletic activities," even though "the sound therefrom is cast directly upon the streets and public places" and "the sounds coming therefrom can be heard to the annoyance or inconvenience of the travelers upon any street or public places or of persons in neighboring premises," which would, without § 3, be barred by § 2.

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how we can read the Constitution one day to forbid and the next day to compel use of public tax-supported property to help a religious sect spread its faith.

There is not the slightest evidence of discrimination or prejudice against the appellant because of his religion or his ideas. This same appellant, not a resident of Lockport but of Buffalo, by the way, was granted a permit by the Chief of Police and used this park for four successive Sundays during the same summer in question. What has been refused is his application for a second series of four more uses of the park. Lockport is in a climate which has only about three months of weather adaptable for park use. There are 256 recognized religious denominations in the United States and, even if the Lockport populace supports only a few of these, it is apparent that Jehovah's Witnesses were granted more than their share of the Sunday time available on any fair allocation of it among denominations.

There is no evidence that any other denomination has ever been permitted to hold meetings or, for that matter, has ever sought to hold them in the recreation area. It appears that on one of the Sundays in question the Lutherans were using the ball park. This also appears to be public property. It is equipped with installed loudspeakers, a grandstand and bleachers, and surrounded by a fence six feet high. There is no indication that these facilities would not be granted to Jehovah's Witnesses on the same terms as to the Lutherans. It is evident, however, that Jehovah's Witnesses did not want an enclosed spot to which those who wanted to hear their message could resort. Appellant wanted to thrust their message upon people who were in the park for recreation, a type of conduct which invades other persons' privacy and, if it has no other control, may lead to riots and disorder.

The Court expresses great concern lest the loud-speakers of political candidates be controlled if Jehovah's Witnesses can be. That does not worry me. Even political candidates ought not to be allowed irresponsibly to set up sound equipment in all sorts of public places, and few of them would regard it as tactful campaigning to thrust themselves upon picnicking families who do not want to hear their message. I think the Court is overconcerned about danger to political candidacies and I would deal with that problem when, and if, it arises.

But it is said the state or municipality may not delegate such authority to a Chief of Police. I am unable to see why a state or city may not judge for itself whether a Police Chief is the appropriate authority to control permits for setting up sound-amplifying apparatus. *Cox* v. *New Hampshire,* 312 U. S. 569. It also is suggested that the city fathers have not given sufficient guidance to his discretion. But I did not suppose our function was that of a council of revision. The issue before us is whether what has been done has deprived this appellant of a constitutional right. It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case.

I disagree entirely with the idea that "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here." It is for the local communities to balance their own interests—that is politics—and what courts should keep out of. Our only function is to apply constitutional limitations.

I can only repeat the words of Mr. Justice Holmes, disregarded in his time and even less heeded now:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what

> I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." [3]

And even if this were a civil liberties case, I should agree with Chief Justice Hughes, writing for a unanimous Court:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." [4]

The judgment of the Court of Appeals of New York should be affirmed.

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[3] *Baldwin* v. *Missouri*, 281 U. S. 586, 595.

[4] *Cox* v. *New Hampshire*, 312 U. S. 569, 574.

UNITED STATES *v.* NATIONAL CITY LINES, INC. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 544. Argued April 28, 1948.—Decided June 7, 1948.

1. Where a civil proceeding against a corporation under the antitrust laws is brought in any federal judicial district of those wherein such a suit is authorized to be brought by § 12 of the Clayton Act, the federal district court is without power to decline to exercise its jurisdiction by applying the doctrine of *forum non conveniens*. Pp. 574–597.
2. The legislative history of § 12 of the Clayton Act clearly establishes that Congress intended to leave no room for judicial discretion to apply the doctrine of *forum non conveniens* to deprive the plaintiff of the choice of forum given by the section. Pp. 582–588.
3. It being clear that the purpose of Congress was to confer upon the plaintiff in civil antitrust proceedings against corporations the right of choice among the specified venues, considerations of policy which might otherwise justify the exercise of judicial discretion in the matter become irrelevant. Pp. 588–589.
4. The fact that, pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure, a criminal prosecution under the antitrust laws against the same corporate defendants has been transferred to another district from that in which the civil proceeding was brought, does not justify dismissal of the civil proceeding by applying the doctrine of *forum non conveniens*. Pp. 593–596.
5. When Congress has vested courts with jurisdiction to hear and determine causes and has given complaining litigants the right of choice among them, inconsistent with the exercise of discretionary judicial power to defeat the choice made, the doctrine of *forum non conveniens* can have no effect. Pp. 596–597.
6. Whether a statute has conferred upon a plaintiff a right of choice of venue is to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection. P. 597.

7 F. R. D. 456, reversed.

The United States brought a civil proceeding against corporate defendants to enjoin alleged violations of the antitrust laws. The District Court dismissed the complaint upon the ground of *forum non conveniens*. 7 F. R. D. 456. A direct appeal was taken to this Court under the Expediting Act. *Reversed*, p. 597.

Charles H. Weston argued the cause for the United States. With him on the brief were *George T. Washington, Acting Solicitor General* (for this case), *Assistant Attorney General Sonnett, Robert G. Seaks* and *Philip Elman*.

C. Frank Reavis argued the cause for appellees. With him on the brief were *Martin D. Jacobs, Horace G. Hitchcock, Oscar A. Trippet, Henry M. Hogan, N. J. Rosiello, H. D. Emery, Rayburn L. Foster, R. B. F. Hummer, Hubert T. Morrow, Marshall P. Madison, Eugene M. Prince, Francis R. Kirkham* and *Everett A. Mathews*.

Mr. Justice Rutledge delivered the opinion of the Court.

In *United States* v. *Scophony Corp.*, 333 U. S. 795, we recently considered the meaning and effect of § 12 of the Clayton Act,[1] providing for venue and service of process in civil antitrust proceedings against private corporations. This case brings before us another phase of the section's effect in like proceedings. The principal ques-

[1] "Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 Stat. 736, 15 U. S. C. § 22.

tion, and the only one we find it necessary to consider, is whether the choice of forums given to the plaintiff by § 12 is subject to qualification by judicial application of the doctrine of *forum non conveniens*.

The suit was brought by the United States against nine corporations [2] for alleged violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 15 U. S. C. §§ 1, 2. The basic charge is that the appellees conspired to acquire control of local transportation companies in numerous cities located in widely different parts of the United States,[3] and to restrain and monopolize interstate commerce in motorbusses, petroleum supplies, tires and tubes sold to those companies, contrary to the Act's prohi-

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[2] These, with the states of their incorporation and their principal places of business, are as follows:

Corporation	*State of incorporation*	*Principal place of business*
National City Lines, Inc.	Delaware	Chicago
American City Lines, Inc.	"	"
Pacific City Lines, Inc.	"	Oakland, Calif.
Standard Oil Co. of California	"	San Francisco
Federal Engineering Corp.	California	"
Phillips Petroleum Co.	Delaware	Bartlesville, Okla.
General Motors Corp.	"	Detroit, Mich.
Firestone Tire & Rubber Co.	Ohio	Akron, Ohio
Mack Manufacturing Corp.	Delaware	New York

[3] Forty-four cities in sixteen states are included. The states are as widely scattered as California, Florida, Maryland, Michigan, Nebraska, Texas and Washington. The larger local transportation systems include those of Baltimore, St. Louis, Salt Lake City, Los Angeles and Oakland. The largest concentrations of smaller systems are in Illinois, with eleven cities; California with nine (excluding Los Angeles); and Michigan with four. The local operating companies were not named as parties defendant.

bitions.[4] Injunctive and other relief of an equitable nature was sought.[5]

The appellees filed various motions, including the one involved in this appeal. It sought dismissal of the complaint on the ground that the District Court for the Southern District of California was not a convenient forum for the trial. This motion was supported by a showing not only of inconvenience to the defendants of trial in the California district, but also that the District Court for the Northern District of Illinois, Eastern Division (Chicago), would be the most convenient forum for them. The showing was by affidavits, executed by officers, attorneys and employees of the corporate defendants.[6]

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[4] The appellee companies fall into two groups. The largest, which may be called the supplier group, includes the six last named in note 2 above. Except Federal, they are engaged in producing and distributing the commodities purchased by the local operating companies, the sale of which is charged to be monopolized and restrained. Federal is a wholly owned subsidiary of Standard, engaged in managing investments for Standard.

The other group, including the first three companies listed in note 2, is collectively called City Lines. National is a holding company with operations directed from Chicago. American and Pacific are its subsidiaries. The three own, control or have substantial interests in the operating companies.

The complaint charges that the supplier appellees furnish capital to City Lines for acquiring control of the local operating systems, upon the understanding that City Lines cause all requirements of the local systems in busses, petroleum products, tires and tubes to be purchased from the supplier appellees and no other sellers.

[5] The prayer of the complaint sought complete divestiture of the supplier appellees' financial interests in City Lines; partial divestiture of City Lines' interests in local transportation companies; voiding of existing contracts between the supplier appellees and City Lines; and an injunction against purchases from those suppliers by City Lines or their operating companies, except in accordance with a competitive bidding plan to be included in the decree.

[6] In highly attenuated summary the showing was that the transactions creating the core of the charged conspiracy took place chiefly

Counteraffidavits were filed in opposition on behalf of the Government.[7]

After oral argument, the District Court filed findings of fact and conclusions of law together with a written opinion, substantially accepting appellees' showing and sustaining the motion. 7 F. R. D. 456. Accordingly it entered judgment dismissing the complaint, but without prejudice to the institution of a similar suit against the named defendants "in a more appropriate and convenient forum." This decision is brought to us for review on direct appeal pursuant to the statutes applicable in such cases.[8]

It is not disputed that the District Court has jurisdiction in the basic sense of power to hear and determine the cause or that it has venue within the provisions of § 12.[9] Nor can it be questioned that any of the defendants can be brought personally within that court's jurisdiction by service of process made in accordance with

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in or near Chicago; appellees' chief witnesses and documentary evidence are located there; their transportation to Los Angeles and extended presence there will cause great hardship; no defendant "resides" or has its principal office or place of business in the California district (cf. note 2); and two trials in distant cities, see text *infra* at note 41, will greatly magnify the hardship. See 7 F. R. D. 456, 465.

[7] The Government stresses that three of the five supplier defendants transact business and are "found," cf. note 1, in the California district; the volume of sales allegedly restrained is much greater on the Pacific Coast than elsewhere; substantial portions of the evidence, oral and documentary, will be produced from California, etc. Cf. 7 F. R. D. 456, 465.

[8] 32 Stat. 823, 36 Stat. 1167, 15 U. S. C. § 29; 43 Stat. 938, 28 U. S. C. § 345.

[9] It is conceded that three of the defendants, Standard, General Motors, and Firestone, transact business within the Southern District of California. The others apparently were served either pursuant to the concluding clause of § 12 or pursuant to § 5 of the Sherman Act. See note 10 *infra*.

the provisions of either § 12, or those of § 5 of the Sherman Act.[10] The only question presented concerning the court's power is whether, having jurisdiction and venue of the cause and personal jurisdiction of the defendants, the court also was authorized to decline to exercise its jurisdiction upon finding, without abuse of discretion, that the forum was not a convenient one within the scope of the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens.*

It would serve no useful purpose to review in detail the reasoning or the authorities upon which the District Court ruled the doctrine applicable in such cases as this, or therefore the further groundings upon which it proceeded in holding the forum inconvenient. For the view has prevailed without qualification during the life of § 12, thirty-four years, that the choice of venues expressly given to the plaintiff is not to be qualified by any power of a court having venue under any of the section's alternatives to decline to exercise the jurisdiction conferred. None of the decisions on which the District Court relied suggested, much less decided, that such a power exists. This therefore is a case of first impression, seeking departure from long-established practice. Moreover, the analogies drawn from other types of cases in which the doctrine has been applied [11] cannot survive in the face of the section's explicit terms and the patent intent of Congress in enacting it.

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[10] "SEC 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof." 26 Stat. 210, 15 U. S. C. § 5. Section 4 of the Sherman Act (*i. e.*, "this act") refers specifically to civil actions brought by the Government. Cf. *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, 374.

[11] See note 46 *infra.*

In the *Scophony* case we gave attention to the history of § 12, which as there related is as pertinent to the question now presented as it was to the issues then under consideration.[12] Reference to the *Scophony* opinion, Part I, 333 U. S. at 802–810, will avoid the necessity for repeating the history here *in extenso*. But its present applicability will be accentuated by recalling that we reaffirmed the ruling in *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, namely, that § 12 of the Clayton Act had enlarged the venue provision of § 7 of the Sherman Act, with the intent and effect to give the plaintiff the right to bring antitrust proceedings not only in the districts where the corporate defendant "resides or is found," as § 7 had authorized, but also "in any district wherein it . . . transacts business." [13]

In the *Eastman* case, as the *Scophony* opinion emphasized, the Court had rejected the argument that the addition of "or transacts business" was no more than a redundant reformulation of "is found"; instead it gave the added words broader and less technical meaning than "is found" had acquired under prior decisions.[14] This was done, as the *Eastman* opinion stated, because accepting the contrary view would have rendered the addition meaningless and defeated the plain remedial purpose of § 12. 273 U. S. at 373. That section, the Court held, supplemented "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs com-

[12] In the *Scophony* case we were concerned, not as here with any question of discretion to decline the exercise of jurisdiction, but in presently pertinent part with the tests of venue prescribed by the section and whether, on the facts presented, those tests had been met, so as to establish venue in the district of suit.

[13] See note 1.

[14] See *United States* v. *Scophony Corp.*, 333 U. S. 795, Part I at 802–810.

mitted by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—*often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business,* and bring it before the court by the service of process in a district in which it resides or may be 'found.'" (Emphasis added.) 273 U. S. at 373–374.

The *Scophony* opinion reaffirmed this view: "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'–'present'–'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." 333 U. S. at 808.

These conclusions concerning the section's intent and effect are altogether inconsistent with any idea that the defendant corporation can defeat the plaintiff's choice of venue as given, by asking for and securing dismissal of the suit, either on the ground that the venue selected within the statutory limits is inconvenient for the defendant or that another authorized venue is more convenient for it.

No such discretionary power had been exercised by any court during the twenty years of the Sherman Act's application prior to the enactment of § 12, under the narrower range of choice afforded by § 7. None had been suggested, and uniform practice had established that the plaintiff's choice was conclusive, as was true later under § 12 until the deviation in this case.

When therefore Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suits might defeat the plaintiff's choice to serve their own convenience. Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy.[15] Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs or, as was said in the *Eastman* opinion, to remove the "often insuperable obstacle" thrown in their way by the existing venue restrictions.

To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power[16] comprehended by *forum non conveniens,* would have been incongruous, to say the least. In making

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[15] The Clayton Act hardly can be regarded as a statute for the relief of corporate defendants in antitrust proceedings from either procedural or substantive abuses. See Levy, The Clayton Law—An Imperfect Supplement to the Sherman Law, 3 Va. L. Rev. 411.

[16] "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. . . . The court will weigh relative advantages and obstacles to fair trial." *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 508.

the change Congress did not authorize plaintiffs to institute civil antitrust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by § 7. It intended trial to take place in the district specified by the statute and selected by the plaintiff.[17]

This conclusion is supported as strongly by the history of the legislative proceedings relating to the enactment of § 12 as by the foregoing judicial constructions. Section 7 of the Sherman Act had limited venue, as we have noted, to districts in which the defendant "resides or is found." As originally introduced in the House, two sections of the Clayton Act, §§ 4 (then § 5) and 12 (then § 10),[18] perpetuated those provisions.[19] During discussion on the floor, however, various Representatives demanded broader choice of venue for plaintiffs. The demand related to both sections, and the discussion went

[17] The *Eastman* opinion referred to the disadvantages suffered by plaintiffs under § 7 of the Sherman Act who were injured where they resided or conducted their business, only to be forced to seek out the wrongdoing company in a distant forum to secure venue and service of process, and therefore also to transport witnesses and incur other disadvantages in trial. 273 U. S. 359, 373–374. Likewise the legislative discussions hereinafter cited uniformly treat the problem as one involving both instituting the suit and trying it. There is no hint that it was contemplated the two phases of the litigation might be separated and conducted in different places. See, *e. g.*, notes 31 and 32 *infra*.

[18] Section 12 began as § 10, became § 11 in the Senate, and finally § 12 in conference. Similarly, § 4 began as § 5, changed first to § 3, and finally to § 4. Section 4 provides for recovery of treble damages in private antitrust proceedings and its venue provisions apply in terms only to such suits. Section 12 applies to "any suit, action, or proceeding under the antitrust laws against a corporation." This literally is broad enough to include the suits comprehended by § 4.

[19] The original wording of the two sections in respect to venue was slightly different but the substance was identical, both following the preexisting provisions of § 7 of the Sherman Act.

forward now with reference to one, now the other, now both.

The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries.[20] At first they were not much concerned with the exact formulation of the language to accomplish this, several formulas being proposed from time to time.[21] But they were convinced that restricting the choice of venue to districts in which the defendant "resides or is found" was not adequate to assure that the suit could be brought where the cause of action arose, and therefore insisted on change in order to assure that result.[22]

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[20] *E. g.*, Representative Dickinson urged that the language "be extended sufficiently to reach every contingency, so that these concerns may be sued in that jurisdiction where they commit the wrong, where the acts complained of may be committed, where the officers, agents, or employees, acting for their master corporation, may be found setting aside the law, and where the witnesses are easily obtainable . . . ." 51 Cong. Rec. 9190. Later he stated that he wanted to "give the widest liberty of bringing suits where the damage is done and where the action arose." 51 Cong. Rec. 9417.

Representative Sumners spoke to the same effect: "Mr. Chairman, I believe this matter of venue is one of the most important connected with the whole subject of antitrust legislation. . . . The philosophy of legislation with regard to this subject should give the venue at the place wherein the cause of action arises." *Id.* 9467. See also *id.* 9414, 9415, 9608.

[21] "Why not at the end of the section, after the word 'found,' add other words, such as 'doing business, or violating the provisions of this law, or wherever it may do business or where its agents, officers, or employees may be found,' or other appropriate language. A dozen suggestions may be made in the way of amendment." *Id.* 9190. See also *id.* 9414–9417, 9466, 9607, 9663, 9682.

[22] "Mr. SCOTT. What is the gentleman's understanding of the word 'found'; what is its import as used in this section?

"Mr. DICKINSON. I understand that there is some decision by some court that I am not very familiar with that may possibly cover

The committee sponsoring the bill had no objection to this purpose; indeed its members expressly approved it.[23] But at first they opposed any amendment, because they thought the object fully achieved by the words "is found." [24] Over this difference the discussion went for-

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the very thought suggested by my proposed amendment. I do not believe that it meets the situation, and if there be any doubt about it, in order that the Government may prosecute successfully and institute suits and actions and have trials the language ought to be clear and definite, and so plain that he who runs may read, so that there can not be two constructions." *Id.* 9415.

"Mr. CULLOP. May I suggest . . . that every suit which has arisen under the Sherman antitrust law has been brought at the home of the corporation itself, or at its principal place of business, and therefore there was no occasion to construe this language, 'is found,' which is ambiguous and uncertain. If you are to construe 'is found,' you will have to construe that as the place of the residence of the corporation, because it is not migratory. You can not get service upon some person traveling throughout the country and hold your jurisdiction throughout that territory.

"Mr. CARLIN. Why should not the suit be brought in the habitat of the corporation? We have been successful so far in that matter.

"Mr. CULLOP. In this case for the very best reason, I think. The gentleman from Virginia [Mr. CARLIN] now has disclosed the purpose of this language, and that is why I am combating it, and for the best of reasons, I think. I do not want to make a resident of California come to Trenton, N. J., to bring a suit for violation of this law, but I want him to sue at home in the jurisdiction where the cause of action arose." *Id.* 9416. See also *id.* 9466–9467, 9607–9608, 9663–9664.

[23] *E. g.*, Representative Floyd stated that the provisions were designed "to give the Government the widest possible scope in getting service in these cases, and the provision is right as it is written and ought not to be changed." *Id.* 9416.

[24] "Mr. FLOYD. . . . The very broadest language that can be used in a statute of this kind conferring jurisdiction is to give the jurisdiction where the corporation resides or is found." *Id.* 9415. And "I think the provisions relating to service properly drafted as they appear in the bill, and that the proposed amendment and others suggested in the debate would narrow the scope of the provisions as drawn." *Id.* 9417. And see *id.* 9608.

ward, as well as over various formulations of the proposed addition. Some were broader than was necessary to achieve the primary aim.[25] Indeed some were so broad that committee members thought their inclusion would jeopardize passage of the entire bill.[26]

To avoid this result and to satisfy those who insisted on amendment, the committee yielded and proposed a substitute amendment for one of those offered from the floor relating to § 4. The committee substitute added the words "or has an agent" after "is found" in the original committee version. 51 Cong. Rec. 9466. This amendment passed the House and later the Senate unchanged. *Id.* 9467. Section 4 thus became law in its present form, for the limited class of cases covered by its terms. Cf. note 18.

Since however the amendment affected only § 4, the problem concerning § 12 remained unresolved. Suggestions therefore were made at once for amending § 12 to bring it into conformity with § 4. *Id.* 9467, 9607. Although other proposals were again put forward, *id.* 9607, the conforming amendment was adopted by the House. *Ibid.*

After the bill passed the House, it was referred to the Senate Committee on the Judiciary. That committee reported it out with § 12 altered by the substitution of "or transacts business" in place of "or has an agent,"

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[25] See, *e. g.*, Representative Cullop's suggestion to confer jurisdiction on state courts without a right of removal to the federal courts. *Id.* 9662–9664.

[26] In opposing the suggestion to confer jurisdiction on the state courts, Representative Floyd argued, *inter alia*, that "any friend of this legislation, as I am sure the gentleman from Indiana [Representative Cullop] is, ought not to aid those who are fighting this legislation—the trusts and the combines of this country—by loading it down with questionable amendments that will tend to defeat it and destroy it in the end." *Id.* 9663.

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but leaving the latter clause in § 4 untouched.[27] The Senate committee reports and the debates in that body throw little light upon the reasons underlying the committee's alteration of § 12 and its failure to alter § 4 so as to make them uniform, except for the general statement that § 12 as reported "concerns the venue or the place where suits to enforce the antitrust laws against corporations may be brought and liberalizes the Sherman law to some extent upon this subject." [28] The bill finally passed the Senate with § 12 substantially as it was reported by the Committee on the Judiciary,[29] and went to conference in that form. In conference the Senate version of § 12 prevailed over that of the House, and the bill was so enacted.[30]

The short outcome was that Congress expanded the venue provisions of the Sherman Act, § 7, in two ways, *viz:* (1) by adding to "resides or is found," in § 4 of the Clayton Act, the words "or has an agent"; (2) in § 12 by adding "or transacts business." Thus strict uniformity in the two sections' venue provisions was not achieved. But whatever their differences may be, each addition was designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust prohibitions.

Moreover the discussions in Congress, particularly in the House, disclose no other thought than that the choice

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[27] In place of the House amendment to § 12 of "or has an agent," the Senate committee substituted this language: "or transacts any business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Sen. Rep. No. 698, 63d Cong., 2d Sess. 73.

[28] 51 Cong. Rec. 14214. See *id.* 14596, 15943, 16048–16052.

[29] An amendment providing for stockholder suits against officers of a corporation violating the antitrust laws was added by the Senate but deleted in conference. See the references cited in note 28.

[30] Sen. Doc. No. 583, 63d Cong., 2d Sess. 9. Sen. Doc. No. 584, 63d Cong., 2d Sess. 18.

of forums was given as a matter of right, not as one limited by judicial discretion. There was, in fact, common agreement upon this among both the advocates and the opponents of amendment.[31] No one suggested that the courts would have discretionary power to decline to exercise the jurisdiction conferred. But since it was universally agreed that the choice of venue, to whatever extent it might be conferred, was to be given as a matter of right, several of the broader amendments were opposed and defeated as going too far.[32]

Congress therefore was not indifferent to possibilities of abuse involved in the various proposals for change. Exactly the opposite was true. For the broader proposals were not rejected because they gave the plaintiff

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[31] See notes 25, 26. The following are examples of the discussion on the plaintiff's right to choose: "Mr. DICKINSON. . . . I do not ask to strike out any language of the committee, but simply to add to it, to make clear and definite and certain so that any person and any corporation may be sued not only where it has its residence as a corporation or individual, but that it can be sued wherever it is found doing business and the cause of action may arise.

"Mr. STEPHENS of Texas. . . . I thoroughly agree . . . ." 51 Cong. Rec. 9414.

"I will say to my friend from Wisconsin [Mr. Stafford] that we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender, as is suggested by a friend sitting near by." The quoted language is that of Representative Webb. 51 Cong. Rec. 16274. See *id.* 9467, 9607; also note 32.

[32] Mr. SCOTT. I could not conceive that anything would deprive the plaintiff of his right to choose the place of trial if he so desired, either in the district where found or where the corporation resides." *Id.* 9417.

"Mr. SCOTT. . . . The amendment enlarges the present interpretation of the word 'found' as applied to the corporate jurisdiction, and permits suit to be brought, *with absolute discretion on the part of the plaintiff,* in any district in which the defendant may have an agent, without defining the character of that agent." (Emphasis added.) *Id.* 9467.

the choice. They were rejected because the choice given was too wide, giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. In adopting § 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice. 51 Cong. Rec. 9466, 9467. But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in the districts where by a course of conduct they had violated the Act with the resulting outlawed consequences. In framing § 12 to include those districts at the plaintiffs' election, Congress thus had in mind not only their convenience but also the defendant company's inconvenience, and fixed the limits within which each could claim advantage in venue and beyond which neither could seek it. Moreover, in § 12, though not in § 4, the right of choice conferred was given designedly to the Government as well as to private suitors.[33]

In the face of this history we cannot say that room was left for judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice given by the section. That result, as other courts have concluded, would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice. *Tivoli Realty* v. *Interstate Circuit,* 167 F. 2d 155; *Ferguson* v. *Ford Motor Co.,* 77 F. Supp. 425.

In this view of Congress' action, numerous considerations of policy urged by the appellees as supporting the discretionary power's existence and applicability become irrelevant. Congress' mandate regarding venue and the

[33] Representative Floyd remarked that the committee "language was used to make this section conform to the existing law and enable him [the Attorney General] to have greater liberty in bringing these suits." *Id.* 9415. And see note 23 *supra.*

exercise of jurisdiction is binding upon the federal courts. Const. Art. III, § 2. Our general power to supervise the administration of justice in the federal courts, cf. *McNabb* v. *United States,* 318 U. S. 332, does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue.

It is true that the appellees made a strong showing of inconvenience, albeit by interested persons, when that matter is considered on their presentation alone. On the other hand, the Government advanced strong reasons, apart from the question of power, for not applying the doctrine.[34] But in the view we take of § 12, we need not consider whether the appellees' showing on the facts sufficiently outweighed that of the Government to justify dismissal.[35]

Two important policy considerations were advanced by the Government, however, which not only bear strongly upon that question but affect the question of power, if Congress had not concluded it. The first is that permitting the application of *forum non conveniens* to antitrust cases inevitably would lengthen litigation already overextended in the time required for its final disposition, and thus would violate Congress' declared policy of expediting this type of litigation.[36]

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[34] See notes 6 and 7.

[35] It should be noted, however, that "the mere balance of convenience" in favor of defendants would be insufficient to justify application of the doctrine of *forum non conveniens.* This has been true since the earliest Scottish and English cases applying the doctrine, although the test has been variously formulated. For example, dismissal has been authorized if suit is "vexatious and oppressive and an abuse of the process of the Court," or "only brought to annoy the defendant." See Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 909–911. Cf. also note 16 *supra.*

[36] Congress has provided that the trial of these actions may, upon request of the Attorney General, "be given precedence over others

The argument has merit to support the conclusion we have reached upon the statute. Antitrust suits, even with all the expedition afforded them, are notoriously though often perhaps unavoidably long drawn out. The more complex and important cases seldom require less than three to five years to conclude,[37] except possibly where consent decrees are entered. Often the time necessary or taken is much longer. To inject into this overlengthened procedure what would amount to an additional preliminary trial and review upon the convenience of the forum could not but add approximately another year or longer to the time essential for disposing of the cases, indeed for reaching the merits.[38] Although some instances of inconvenience to defendants will arise from the absence of discretionary power, that will be unavoidably true in almost any event. And it may well be doubted

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and in every way expedited, and be assigned for hearing at the earliest practicable day . . . ." 32 Stat. 823, 15 U. S. C. § 28. The policy of expediting final decision of these cases is further implemented by authorizing direct appeals to this Court. 32 Stat. 823, 15 U. S. C. § 29.

[37] See, *e. g.*, *Schine Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Griffith*, 334 U. S. 100, which were instituted in 1939 and have recently been remanded for further proceedings in the trial courts. And the *Eastman* case, 273 U. S. 359, though begun in 1915, was not decided by this Court until 1927.

[38] In this case, although the proceedings have advanced without unwarranted delay at any one stage, more than a year has been consumed solely on the issue of *forum non conveniens*. The complaint was filed on April 10, 1947. Motions to dismiss, supported by affidavits to show inconvenience, were filed in August and September. The trial court made findings and entered judgment of dismissal on October 15 and allowed an appeal on December 3. The Government filed its statement as to jurisdiction in this Court on January 20, 1948; we noted probable jurisdiction on February 9, heard oral argument on April 28, and today we resolve the issue. But for the intervention of the motions, the consequent dismissal and appeal, the case with appropriate expedition might now be well on the way to final decision on the merits.

that the sum total of inconvenience and injustice resulting will be as great as would follow, for both private plaintiffs and the public, from allowing the inescapable delay incident to the exercise of such a discretionary power. For once the power were found to exist, it is more than likely that injection of the issue would become a common incident of antitrust suits, and create the disadvantage of delay for all concerned.

This consideration is reinforced by another, namely, the difficulty of applying the doctrine in cases such as this, in which the violations charged are nationwide or nearly so in scope and effect, and the defendants are numerous companies widely scattered in the location of their places of incorporation, principal offices, and places of carrying on business and participating in the scheme. In such a case dismissal in one authorized district cannot reinstate or transfer the cause to another. Nor can the court, within the limits of the doctrine, specify the district in which the case shall be reinstituted and tried. It can only terminate the pending proceeding, as was done here, without prejudice to commencement of a like suit "in a more appropriate or convenient forum," with whatever consequences may follow from having to begin all over again.

Further, when that is done, the result well may be in some instances to have the action commenced again, only to precipitate the same issue and consequent delay in the second forum. Conceivably this could occur from forum to forum in succession, depending upon the number of corporations named as defendants and the variety, proximity, and degree of concentration of the locations of their principal offices, places of business, and the relative advantages of other available forums for the variously situated defendants. Accordingly, in an unknown number of such cases the practical result well might be to establish a merry-go-round of litigation upon the

issue, which could be used to defer indefinitely consideration of the merits. The very possibility of such a tactic would greatly hamper the institution as well as the conclusion of antitrust proceedings. Indeed, for cases of this complex type, the uncertainty concerning the outcome of an effort to apply the doctrine might go far toward defeating the Act's effective application to the most serious and widespread offenses and offenders.[39]

Further, even if it is taken that the appellees' activities constituting the core of the violations charged were as fully concentrated in or near the Illinois district as appellees claim, such a concentration might or might not exist in other like proceedings. And in the latter event the problem of selecting the appropriate forum well might become a highly uncertain and difficult one.[40]

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[39] In this case these possibilities have been discounted, largely upon the basis that the appellees had joined in stipulating that all regarded the Illinois forum "as the proper forum for the above action" and that, in case of dismissal in the California district and filing of a like suit in the Illinois district, the defendants would not move for dismissal of the new suit on the ground of *forum non conveniens*. The stipulation perhaps would be effective in this case to avoid the complexities of repeated motions if suit were reinstituted in Chicago, but not if the Government should select any of the other venues open to it under § 12.

In any event, the stipulation is wholly irrelevant to any question of the general effect of the doctrine's applicability upon antitrust proceedings. For once that were established, no defendant or group of defendants in subsequent cases would be bound, or perhaps likely, to execute such a stipulation.

[40] As the Government points out, in practically all of the more complex types of antitrust proceedings, the principal defendants are corporations doing a multistate business, and the combination or conspiracy charged seldom has a defined locus. In such situations, it is generally true that, whatever the forum chosen by the plaintiff, it will be inconvenient for some of the defendants and often for most of them. When there is such diffusion of possible venue, that fact of course would be basis for declining to apply the

The appellees also strongly urge two other considerations which deserve mention. One is that a criminal prosecution against the appellees (together with seven individuals, officers of some of them), pending in the California district simultaneously with this cause and growing out of substantially the same transactions, had been transferred to the Illinois district shortly before the District Court entered its judgment of dismissal.[41] The transfer was ordered pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure.[42] That action was taken after

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doctrine of *forum non conveniens,* even if applicable. It is also reason for declining to accept the view that the doctrine was intended to be applicable.

Thus, in this case, all but two of the appellees were incorporated and hence "reside" in Delaware. None are incorporated in Illinois, and only two have their principal places of business or headquarters in Chicago. The invariable practice for fifty-four years, first under § 7, then under § 12, has been that suit may be maintained and trial had at the plaintiff's election where the corporation "resides" or where it "is found." But if this suit had been brought in Delaware or at any of the principal places of business except Chicago, under the application of *forum non conveniens* made here the trial could not have proceeded in any of those other places. Cf. *Tivoli Realty* v. *Interstate Circuit*, 167 F. 2d 155. The statute, § 12, does not require trial to be had where the agreement in conspiracy takes place. Locus of coming to agreement is not the gist of the offenses proscribed.

[41] The indictment was returned on April 9, 1947; on August 14, 1947, defendants' motion to transfer the cause was granted. The civil complaint was filed on April 10, 1947, and dismissed on October 15, 1947.

[42] Rule 21 (b) provides: "Offense Committed in Two or More Districts or Divisions. The Court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." Cf. note 43 and

the District Court had made findings of fact and conclusions of law founded upon and substantially adopting the appellees' showing, which was practically identical with their showing in this case. Consequently, as the cases now stand, the criminal cause is to be tried in the Illinois district while this civil suit founded upon practically the same transactions and affecting the same corporate defendants is to be tried in the California district.

Great emphasis is placed upon this as an impelling reason for holding *forum non conveniens* applicable here, and then sustaining the order of dismissal under that doctrine and the District Court's findings. But, for the reasons above stated, we think the matter has been concluded by the terms and intent of § 12. Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case.[43] In any event, the validity of that order is not before us. We therefore express no opinion upon either of those questions. But the fact that we cannot do so goes far to nullify the effect of appellee's argument of hardship arising from the transfer. For that argument comes down, in the peculiar circumstances, to one that because the District Court on appellees' application has

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text. In addition to the questions there reserved, we express no opinion on whether Rule 21 (b) applies to criminal antitrust prosecutions.

The Federal Rules of Criminal Procedure became effective March 21, 1946. It would be stretching very far the idea of utilizing legislative history, if criminal rules adopted twenty-two years after a civil statute was enacted were given any significance upon the meaning or effect of the statute.

[43] The precise point apparently has not arisen since the adoption of Rule 21 (b), but there would seem to be no statutory basis for appeal from an order of this type. See 18 U. S. C. § 682. See also *Semel* v. *United States*, 158 F. 2d 231, 232.

transferred the criminal cause by a dubiously reviewable order, perforce of that action it should also dismiss this civil cause and we should sustain the dismissal.

In practical effect the outcome of accepting such an argument as ground for sustaining both the power and the dismissal would be to make Rule 21 (b) controlling in civil as well as criminal cases involving the same transactions and parties, thus overriding § 12, and at the same time depriving the plaintiff in the civil cause of anything more than perfunctory review of the District Court's order of dismissal.[44]

Hardly can it be taken that Rule 21 (b) was intended so to override the provisions of § 12, to confer power on the District Courts to do so, or to nullify the plaintiff's right of appeal from an order depriving it of the statutory privilege of choosing the venue. Yet these would be the practical results, if the consideration that the court has ordered transfer of the criminal case is to be controlling or highly influential, as it undoubtedly would be in most cases, in applying the doctrine of *forum non conveniens* in the civil cause. If matters of policy were material, these possible consequences would add force to the view that the doctrine is not applicable.

Moreover, if the transfer should result in hardship to the appellees,[45] insofar as the hardship arises from that

[44] All that defendants would have to do, in any practical sense, in order to secure dismissal, would be to convince the District Court that transfer of the criminal cause should be made, and then demonstrate the self-evident fact that trial of the two causes in different districts would be inconvenient.

[45] In view of our decision in this civil case, there would be nothing to prevent appellees from making a motion under Rule 21 (b) of the Criminal Rules to have the criminal cause retransferred to the Southern District of California, if in the changed outlook arising from this decision that should be their pleasure.

The Government argues further that as a practical matter there

cause it is one which was avoidable by them and will be incurred as a result of their own action in applying for it. That they have voluntarily incurred it is no good reason for depriving the plaintiff of its statutory right of choice under the terms and policy of § 12 in the entirely distinct civil suit.

Finally, both appellees and the District Court have placed much emphasis upon this Court's recent decisions applying the doctrine of *forum non conveniens* and in some instances extending the scope of its application.[46] Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has

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is little likelihood that appellees will be forced to defend both actions. For its distinctly footnote value we quote from its brief:

"When the Government believes that there has been a violation of the Sherman Act, it sometimes seeks corrective relief by way of a civil suit filed after, or simultaneously with, the return of a criminal indictment, but when companion proceedings are thus instituted it is only rarely that both are ultimately brought to trial. If it is held on the present appeal that dismissal of the civil complaint was erroneous, the Government will not seek to bring the criminal and the civil cases to trial simultaneously and, in any event, it is highly unlikely that it will be found necessary to bring both cases to trial.

"If the Government obtains a decree in a civil suit, the defendants in a related criminal case usually file pleas of *nolo contendere*. If the criminal case is tried first and verdicts of guilty are returned, there is nothing left for trial in the civil case except the question of relief (*Local 167* v. *United States,* 291 U. S. 293, 298–299), and the parties are customarily able to reach an agreement on this question and dispose of the civil case by the entry of a consent decree."

[46] *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermens Mutual Co.,* 330 U. S. 518. See also *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44; *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698; *Williams* v. *Green Bay & W. R. Co.,* 326 U. S. 549.

invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. *Baltimore & O. R. Co.* v. *Kepner,* 314 U. S. 44; *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698. The question whether such a right has been given is usually the crux of the problem. It is one not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a "special" or a "general" one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.

This is a case in which the pertinent factors make clear that the courts were given no such power. Accordingly the judgment is

Reversed.

MR. JUSTICE JACKSON, concurring.

I agree with the conclusion of the Court but arrive at it by a shorter and different route.

We have just had occasion to review and to decide, by a divided Court, cases involving the doctrine of *forum non conveniens*. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U. S. 518. We there held that, in cases where the plaintiff was in court in an ordinary civil suit only by reason of the venue statutes that apply generally, the court could exercise discretion in dismissing complaints to prevent imposition on its jurisdiction if the circumstances of the particular case showed an abuse of the option vested in

plaintiff by the general venue statutes. But we also pointed out that, where the choice of forum was authorized by a special venue statute, this discretion to dismiss would not be implied. The distinctions there made between general and special venue statutes may have been overly simple from the viewpoint of the dialectician. But as working tools of everyday craftsmen they do serve to point out a difference that I think governs here.

Congress made some rather unusual provisions as to venue in antitrust cases. Had it stopped there, it might have been permissible for the courts to devise their own limitations to prevent abuse of their process. But Congress did not stop there. Not only once but three times it has enacted almost identical provisions which check any abuse or oppression from compelling defendants to defend in places remote from their habitat. 15 U. S. C. § 5 (1890), 15 U. S. C. § 10 (1894), 15 U. S. C. § 25 (1914).

The scheme of the statutes, as I see it, is that the Attorney General may lay the venue in any district where he may properly serve one or more of his defendants. He may go ahead with his action against them, whether he is allowed to bring in others or not. Before he can bring in other parties than those properly served in the district, *i. e.*, those "inhabitant," "transacting business," or "found" there, it must be made to appear to the court that the ends of justice require that they be brought before the court, in which case they may be summoned from any district.

Congress has here provided a practice by which any defendant, who has not subjected himself to suit in the district, may obtain the same protections which the *forum non conveniens* doctrine would afford.

In this case, the defendants, who might be entitled to urge the doctrine, have not resisted or contested the

order bringing them into the suit. It was by so doing that they could have shown that the ends of justice would not be served by such action. Instead, they desire to submit to being brought in and then use their position to throw the whole case out. This, I think, cannot be done.

The special provision Congress has made, both to establish venue and to protect against its abuse, whether the exact equivalent of *forum non conveniens* or not, seems to me to preclude its application by the courts to this class of cases.

For this reason I concur in the result.

MR. JUSTICE FRANKFURTER, dissenting.

This is an equity suit for violation of §§ 1 and 2 of the Sherman Law brought in the United States District Court for the Southern District of California. The same defendants were indicted in the same court for the same transactions under the criminal provisions of the Sherman Law. That court transferred the criminal proceedings from the Southern District of California to the District Court for the Northern District of Illinois because it was "in the interest of justice" to order the transfer. In doing so, the court below was obedient to Rule 21 (b)[1] of the Federal Rules of Criminal Procedure, formulated by this Court and having the force of law. 327 U. S. 823 *et seq.* With convincing particularity the District

[1] "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Court set forth its reasons for making this transfer.[2] After the transfer of the criminal case, the court granted the motion now before us, dismissing the equity suit "in the interest of justice, just as the same facts in the companion criminal prosecution required its transfer to another district." 7 F. R. D. 456, 465.

Is it not incongruous that that which "the interest of justice" demanded in the criminal prosecution is beyond the power of a court in a civil suit against the same defendants on the same transactions? [3]

Of course Congress may leave no choice to a court to entertain a suit even though it is vexatious and oppressive for the plaintiff to choose the particular district in which he pursues his claim. But such limitation upon the power of courts to administer justice ought not to be lightly drawn from language merely conferring jurisdiction. The manner in which jurisdictional provisions are appropriately to be read is illustrated by our decision in *Massachusetts* v. *Missouri,* 308 U. S. 1, where this Court recognized "considerations of convenience, efficiency and justice" even when a State invoked the Court's original jurisdiction in what was concededly a justiciable controversy. 308 U. S. at 19. I do not find in the

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[2] "I do not question the motive of the Government in instituting the prosecution in this district.

"But I am satisfied that a trial here would impose unnecessary hardships on the defendants and entail unjustifiable expense which it is the object of the new rules of criminal procedure, and especially of the rule under discussion, to avoid. Altogether the facts spell out the vexatiousness and oppressiveness which the Supreme Court has warned us to eschew in matters of this character." 7 F. R. D. 393, 402–403.

[3] Cf. L. Hand, J., in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429: "In United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788, a later statute in pari materia was considered to throw a cross light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court."

scheme of the anti-trust acts and of their relevant legislative history the duty to exercise jurisdiction so imperative as to preclude judicial discretion in refusing to entertain a suit where "the interest of justice" commands it.

Defendants in an anti-trust suit may no doubt attempt to resort to delaying tactics by motions claiming unfairness of a particular forum. Neither must we be indifferent to the potentialities of unfairness in giving the Government a wholly free hand in selecting its forum so long as technical requirements of venue are met. See, *e. g.*, *The Railway Shopmen's Strike Case* (*United States* v. *Railway Employees*), 283 F. 479. All parties to a litigation tend to become partisans, and confidence in the fair administration of justice had better be rested on exacting standards in the quality of the federal judiciary. Federal judges ought to be of a calibre to be able to thwart obstructive tactics by defendants and not be denied all power to check attempted unfairness by a too zealous Government.

I find nothing in the anti-trust acts comparable to the considerations which led this Court to conclude that the provisions of the Federal Employers' Liability Act were designed to give railroad employees a privileged position in bringing suits under that Act. See, especially, concurring opinion in *Miles* v. *Illinois Cent. R. Co.*, 315 U. S. 698, 705.

I am of opinion that the District Court had power to entertain the motion on the basis of which it entered the judgment.

MR. JUSTICE BURTON joins this dissent.

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UNITED STATES *v.* ZAZOVE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 432. Argued April 19, 1948.—Decided June 14, 1948.

1. Section 602 (h) (2) of the National Service Life Insurance Act of 1940 provides that insurance payable to a beneficiary who is over 30 at the time of the insured's death shall be paid in equal monthly installments for 120 months certain, with such payments continuing during the remaining lifetime of the beneficiary. Regulation 3450 of the Veterans' Administration, issued as a construction of § 602 (h) (2), provides that the amount of the monthly installments so payable shall be calculated in accordance with a schedule based upon the beneficiary's age and the American Experience Table of Mortality. The beneficiary of a National Service Life Insurance policy, who was over 30 at the time of the insured's death in 1943, sued to obtain monthly payments in an amount which, over a period of 120 months, would equal the face amount of the policy plus interest. She contended that Regulation 3450 was not a proper construction of § 602 (h) (2). *Held:* The regulation is valid. Pp. 604–624.
2. Read in its entirety and with regard to the specialized, technical sense in which some of its wording is generally employed in the insurance field, § 602 (h) (2) is not so clear and free from ambiguity as to preclude the construction adopted by the Veterans' Administration in Regulation 3450. Pp. 608–610.
3. In construing the provisions of an Act of Congress setting up a system of national life insurance, only the intent of Congress need be ascertained; the layman understanding of the policy holder does not have the relevance that it has in the case of an ordinary commercial insurance contract. Pp. 610–611.
4. It is not enough, however, that the regulation is not plainly interdicted by the statute, for in § 608 of the Act, as amended, Congress manifested an intent that regulations of the Veterans' Administration be subjected to more than casual judicial scrutiny to determine whether they are "not inconsistent" with the statute, whether they are "necessary or appropriate" to carry out its purposes, and whether they are "properly" issued. Pp. 611–612.
5. But when the respective assumptions and consequences of each of the two alternative interpretations of § 602 (h) (2) presented

in this case are tested against the legislative history and the statute viewed in its entirety, it is clear that the one incorporated in Regulation 3450 is that intended by Congress. Pp. 612–624.

(a) Under a contrary interpretation of the statute, a beneficiary over 30 would in most cases receive a far greater aggregate amount than a beneficiary under 30. There is no indication that Congress intended this sharp disparity of treatment, and it does not result under the regulation. Pp. 612–616.

(b) Congress contemplated that the reserve fund to meet the liabilities of National Service Life Insurance policies was to be self-supporting, sustained by the premiums paid and by the yield of premiums invested, except as to those exceptional items of cost as to which the statute specifically provided that the Government would bear the financial burden. Under the construction advanced by the beneficiary in this case, however, the Government's total liability would be increased to an extent requiring either special Congressional appropriations or a substantial increase in premium rates. The statute nowhere specifies that the Government should bear this huge cost, nor is there any basis for assuming that Congress envisaged premium rates high enough to meet an added liability of such proportions. Pp. 616–617.

(c) The practice in effect under United States Government Life Insurance for World War I veterans and the long-established practice of commercial insurance companies, which must be viewed as part of the background of experience which the draftsmen of § 602 (h) (2) had in mind, both accord with the construction embodied in Regulation 3450. Pp. 617–619.

(d) The juxtaposition of § 602 (h) (2) with other provisions indicating that actuarial principles were to be followed is also significant. P. 620.

(e) The subsequent legislative history of the statute clearly indicates Congressional approval of the construction put on § 602 (h) (2) by Regulation 3450. Pp. 620–624.

162 F. 2d 443, reversed.

In a suit by a beneficiary, the District Court sustained the validity of Regulation 3450 of the Veterans' Administration as being in accord with § 602 (h) (2) of the National Service Life Insurance Act of 1940. The Circuit Court of Appeals reversed. 162 F. 2d 443. This Court granted certiorari. 332 U. S. 835. *Reversed,* p. 624.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, H. Graham Morison, Paul A. Sweeney, Melvin Richter* and *Philip Elman.*

Edward H. S. Martin argued the cause for respondent. With him on the brief was *John B. King.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

We are called upon in this case to determine whether Regulation 3450 of the Veterans' Administration [1] is in accord with a proper construction of § 602 (h) (2) of the National Service Life Insurance Act of 1940.[2]

Respondent, Tillie Zazove, was designated beneficiary in a $5,000 contract of National Service Life Insurance. The insured died in 1943, and the named beneficiary filed her claim for the insurance in the Veterans' Administration. Upon denial of the claim, suit was instituted in the District Court for the Northern District of Illinois.[3] The District Court ruled, on its view of the facts, that Mrs. Zazove did not stand *in loco parentis* to the soldier and hence was not one of the persons who could be made a beneficiary as provided by the statute.[4] On appeal, the Circuit Court of Appeals for the Seventh Circuit ruled to the contrary and remanded for further proceedings. 156 F. 2d 24.

The issue remaining for determination by the District Court upon remand was the validity of Regulation 3450. It sustained the regulation as properly issued pursuant to

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[1] 6 Fed. Reg. 1162, 1166, 38 C. F. R. 1941 Supp. § 10.3450.

[2] Part I, Title VI of the Second Revenue Act of 1940, Act of Oct. 8, 1940, c. 757, 54 Stat. 974, 1008, 38 U. S. C. §§ 801, 802 (h) (2).

[3] Pursuant to § 617 of the Act, 38 U. S. C. § 817.

[4] § 602 (g), 38 U. S. C. § 802 (g).

the National Service Life Insurance Act. On a second appeal, the Circuit Court of Appeals, one judge dissenting, reversed. 162 F. 2d 443. We granted certiorari to review the important question of statutory construction involved. 332 U. S. 835.

The basic statutory provision involved is § 602 (h) of the National Service Life Insurance Act of 1940, which provides that insurance issued under the Act "shall be payable in the following manner:

> "(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.
>
> "(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary."

The Administrator, acting under the general rule-making power given him by the Act,[5] promulgated Regulation 3450 (set forth in the margin)[6] shortly after the enactment

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[5] Sec. 608, 38 U. S. C. § 808: "The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. . . ."

[6] "*Payment to first beneficiary.* Upon due proof of the death of the insured while a National Service Life Insurance policy is in force, the monthly installments, without interest, which have accrued since the death of the insured (the first installment being due on the date of death of the insured) and the monthly installments which thereafter become payable in accordance with the provisions of the policy, shall be paid to the beneficiary or beneficiaries entitled in the following manner:

"(a) If the beneficiary to whom payment is first made is under

of the statute, to put § 602 (h) into operation. The regulation provides, for beneficiaries covered by clause (1), that "payment shall be made in 240 equal monthly installments at the rate of $5.51 for each $1,000 of such insurance." The amount of the monthly installment is so calculated that the sum of the 240 installments equals the face value of the insurance plus 3% interest per annum.

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thirty years of age at the time of the death of the insured, payment shall be made in 240 equal monthly installments at the rate of $5.51 for each $1,000 of such insurance.

"(b) If the beneficiary to whom payment is first made is thirty or more years of age at the time of the death of the insured, payment shall be made in equal monthly installments for 120 months certain, with such payment continuing throughout the remaining lifetime of such beneficiary. The amount of the monthly installment for each $1,000 of insurance shall be determined by the age of the beneficiary as of last birthday at the time of the death of the insured, in accordance with the following schedule based upon the American Experience Table of Mortality and interest at the rate of 3 per-centum per annum:

"Age of beneficiary at date of death of insured	*Amount of each monthly installment*
30	$3.97
. . .	
40	4.50
. . .	
50	5.39
. . .	
54	5.90
. . .	
60	6.81
. . .	
68	8.19
. . .	
70	8.51
. . .	
80	9.55
. . .	”

It is the provision made by the regulation for first beneficiaries covered by clause (2) that is in issue, since the first beneficiary in this case, Mrs. Zazove, was more than thirty years old when the policy matured. For such beneficiaries, who are to receive payments for life with 120 payments certain, the regulation provides that the "amount of the monthly installment for each $1,000 of insurance shall be determined by the age of the beneficiary as of last birthday at the time of the death of the insured, in accordance with [a] schedule based upon the American Experience Table of Mortality and interest at the rate of 3 percentum per annum . . . ." Accordingly, the size of the monthly installment varies not merely with the face value of the insurance policy but also with the age of the first beneficiary, the latter factor being used as the basis of an actuarial computation whereby the face value of the policy plus interest is equalized over the life expectancy of the beneficiary. Under this interpretation of § 602 (h) (2), the respondent, who was 54 years of age at the death of the insured, is entitled to monthly installments of $29.50, at the rate of $5.90 for each $1,000 of insurance in which she had a beneficial interest. These installments are to be paid for 120 months certain,[7] and to continue during her remaining lifetime if she lives beyond that 10-year period.

In reversing the District Court, the Circuit Court of Appeals held this method of calculation set forth by Regulation 3450 to be inconsistent with the provisions of § 602 (h) (2). It construed the latter provisions, in accord with the respondent's contention, as plainly requiring

[7] If the first beneficiary fails to survive the 10-year period, after having received at least one installment, "thereafter monthly installments in the same amount shall be paid to the person or persons entitled as beneficiary until all of the installments certain shall have been paid." Regulation 3451, 6 Fed. Reg. 1162, 1166, 38 C. F. R. Cum. Supp. § 10.3451.

that the total of the equal monthly installments payable over a period of 120 months certain should equal the face value of the insurance, plus interest. Under this construction, Mrs. Zazove is entitled to receive $48.08, instead of $29.50, as her monthly installment, so that the total of the 120 payments certain will amount to $5,000 (plus interest), instead of $3,450 (plus interest) as determined by the Veterans' Administration, with the monthly installments due her if she survives the period of guaranteed payments continuing at the same rate. Taking into account Mrs. Zazove's life expectancy as estimated by the American Experience Table of Mortality, the actual cash value of this $5,000 insurance policy at the time of the insured's death would amount to $8,145 under respondent's construction, instead of $5,000 as determined by the regulation.[8]

In arriving at its decision, the majority of the Circuit Court of Appeals reasoned that the terms of § 602 (h) (2) are clear and unambiguous; that nothing is said in the statute about equalizing the sum over the life expectancy of the beneficiary; and that Congress unmistakably prescribed payment of the face value plus interest in equal monthly installments over a period of 120 months certain. The major difficulty with this reasoning lies in the inadequate consideration that it gives to the full extent of the payment provided by § 602 (h) (2). In effect, the Circuit Court of Appeals majority stopped short, in its reading of the terms for payment of the insurance in that subsection, at the end of the phrase "in equal monthly installments for one hundred and twenty months certain." By stopping short at that phrase, the court failed to consider the alternative possibility that Congress intended the immediately following phrase, "with such payments continuing during the remaining lifetime of such beneficiary,"

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[8] See table, *infra* note 18.

to provide an additional and equally essential component of the statutory equivalent for the face value of the insurance. Assuming that this alternative construction of the section is in fact what Congress intended, the only proper interpretative regulation would be one that computed the value of the monthly installments payable to any given first beneficiary in such a manner that the value of the payments to be made, giving due weight to the beneficiary's life expectancy at the death of the insured, would be equivalent to the face value of the policy, plus 3% interest. Regulation 3450 is based on that assumption. It was only because the Circuit Court of Appeals failed to regard the continuing payability of monthly installments, after the payment of the 120 installments certain, as possibly constituting a significant component of the insurance for which the serviceman had contracted, rather than a sheer gratuity conferred by Congress, that the court could view the subsection as plainly and without ambiguity requiring the face value of the insurance to be paid by the end of the 120 months certain.

Moreover, the very presence of the term "certain" in the phrase "equal monthly installments for one hundred and twenty months certain" suggests a view contrary to that reached by the court below. It will be noted that when Congress had in mind, as it clearly did in the case of § 602 (h) (1), that a fixed number of installments provided for should equal the face value of the insurance, there was no occasion for the use of "certain" in describing the installments to be made and, indeed, the term is not found in § 602 (h) (1). While the inclusion of the term in describing the fixed number of installments to be paid under § 602 (h) (2) might conceivably be a mere superfluity, its presence at least suggests the far greater probability that it was used in the specialized, technical sense in which it is generally employed in the insurance field—namely, to indicate a guaranty that a designated number

of monthly payments shall be forthcoming, where a policy provides an option for equal monthly installments continuing throughout the lifetime of a payee, with the individual installment varying in amount depending on the age of the beneficiary when the policy matures.[9]

Hence, in our view, a reading of § 602 (h) (2) in its entirety suffices to demonstrate that the language there used by Congress is far from being so clear and so free from ambiguity as to preclude the construction adopted by the Veterans' Administration in Regulation 3450. To this extent, we believe the reasoning of the Circuit Court of Appeals was in error. But that alone would not necessarily invalidate its holding since, as the Government appears to concede, the terms of § 602 (h) (2) are not unambiguously in accord with the regulation. Indeed, if the ambiguity inherent in § 602 (h) (2) were found in the terms of an ordinary commercial insurance policy, there might well be substantial ground for construing it in favor of the insured.[10]

There is, of course, a marked distinction between the criteria for judicial construction of an ordinary commercial insurance contract, and construction of the provisions of an act of Congress setting up a system of national life insurance for servicemen to be administered by a governmental agency. The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind. In this respect, judicial construction of the statute may appear similar to construction of a commercial policy, where ambiguous provisions are generally construed in favor of the insured. In the latter case, construction favorable to the

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[9] See examples, in the text *infra*, of standard usage of this term in commercial insurance policies.

[10] See *Aschenbrenner* v. *United States Fidelity & Guaranty Co.*, 292 U. S. 80, 84 *et seq.* (1934); *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 F. 945, 956 (1893).

insured rests on the theory that "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted . . . and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports. . . ." [11] But the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person. Only the intent of Congress, which in this case is the insurer, need be ascertained to fix the meaning of the statutory terms; the layman understanding of the policy holder does not have the relevance here that it has in the construction of a commercial contract.[12]

On the other hand, we think it clear that an administrative regulation purporting to construe an ambiguous subsection of the National Life Insurance Act of 1940 is not automatically to be deemed valid merely because not plainly interdicted by the terms of the particular provision construed. The Administrator's general rule-making power, which was exercised in issuing Regulation 3450, is limited by the statute to "such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes . . . ." [13] Moreover, a 1946 amendment to § 608, designed to eliminate the finality of the decisions of the Administrator on

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[11] *Aschenbrenner* v. *United States Fidelity & Guaranty Co.*, *supra* note 10, at 84–85.

[12] This is not, of course, to deny that the statute and regulations adopted pursuant to it give rise to an obligation that has the force of a binding contract with the serviceman insured. See *Lynch* v. *United States*, 292 U. S. 571, 579 (1934).

[13] § 608, 38 U. S. C. § 808, quoted in part *supra*, note 6.

insurance matters,[14] amended the last sentence of § 608 to add the words set out in italics:

> "Except in the event of suit as provided in section 617 hereof, *or other appropriate court proceedings,* all decisions rendered by the Administrator under the provisions of this Act, or regulations *properly* issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, *except a judge or judges of United States courts,* shall have jurisdiction to review any such decisions."

The extension of procedures available to secure judicial review, the interpolation of the word "properly," and the addition, presumably out of an abundance of caution, of the tautological phrase "except a judge or judges of United States courts" are indicative of congressional concern that the regulations of the Veterans' Administration be subject to more than casual judicial scrutiny when they are based upon a controverted construction of the statute.

Accordingly, § 602 (h) (2) must be read in the full context of related sections of the statute and other indicia of legislative intent before we can adequately determine whether the regulation is "not inconsistent" with the provisions of the Act and whether it is "necessary or appropriate to carry out its purposes." We turn therefore from narrow, semantic considerations to a broader context in which the intent of Congress can be more readily comprehended.

The proper meaning of § 602 (h) (2) becomes apparent when the respective assumptions and consequences of each of the two alternative interpretations before us are tested against the legislative history and the statute viewed in its entirety. The construction adopted by the Circuit

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[14] S. Rep. No. 1705, 79th Cong., 2d Sess. 9; H. R. Rep. No. 2002, 79th Cong., 2d Sess. 10; § 12 of the 1946 amendment, 60 Stat. 781, 788, amending § 608.

Court of Appeals would result in conferring a far greater return to beneficiaries in the group covered by § 602 (h) (2), *i. e.*, over thirty at the time of the insured's death, than the return to which first beneficiaries covered by § 602 (h) (1), *i. e.*, under thirty at the insured's death, are entitled. It is unquestioned that the latter group, under the original statutory provisions,[15] were entitled only to 240 monthly installments (*i. e.*, over a 20-year period) which in the aggregate equal the face value plus interest, with no further installments payable thereafter, whether or not the payee survived that limited period. But, under the ruling of the Circuit Court of Appeals, payments in many if not most of the cases involving the former group of beneficiaries would exceed the face value of the policy since any first beneficiary who survived the 10-year period of § 602 (h) (2) would automatically secure more than that amount. In fact, the actual value of a policy, at maturity, to a 30-year old beneficiary, under this ruling, would be almost two and a half times its face amount,[16] whereas the 29-year old beneficiary, paid in accordance with § 602 (h) (1) (whose interpretation is not open to question), could never receive more than the face amount, plus interest. And the aggregate of guaranteed and continuing payments made at so high a rate under § 602 (h) (2) would necessarily greatly exceed the total face value of the policies issued under the statute.[17]

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[15] The statute was amended in 1946 to make all future beneficiaries, regardless of age, eligible for the life annuity with 120 guaranteed payments previously limited to those over thirty. § 9 of the 1946 amendment, 60 Stat. 781, 785, adding subsection (t) (3) to § 602 of the 1940 Act.

[16] See table, *infra* note 18.

[17] *Ibid.*

As mentioned in note 15 *supra*, the life annuity with 120 guaranteed payments was made available in 1946 to all beneficiaries regardless of age. Acceptance of respondent's interpretation would require us to view Congress as having offered, in the 1946 amendment, four

This sharp disparity between the two different groups of beneficiaries does not result under the regulation, since

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optional settlements (see note 36 *infra*), three of which would be limited in value at maturity to the face amount of the insurance, while the fourth option would offer a value far in excess of the face amount and would be available to all beneficiaries without regard to their age at the insured's death.

By the calculations of the American Experience Table, a person has to be 68 years old before his life expectancy is less than 10 years. Accordingly, in all cases where the first beneficiary is under 68 years of age at the time the insured dies, the actual value of the policy, thus computed, would exceed its face amount. The Administrator estimates that, on the approximately 2.1 billion dollars of death claims already incurred and now being settled under the provision for life income with installments guaranteed for 120 months, the additional liability that would result if settlement were required to be made pursuant to the Circuit Court's holding would amount to approximately 1.8 billion dollars. Government's brief, p. 67. Potential liability on the billions of dollars of insurance now in force and yet to mature would similarly be vastly increased under this view.

The precise size of the latter liability is of course problematical. In a letter to the Solicitor General, dated October 24, 1947, the Veterans' Administration estimated the amount of insurance in force and not yet matured at 35 billion dollars. Assuming that all of that insurance would be held to mature at death and that the typical beneficiary would be a woman aged 30 at the death of her husband, and that all policies would be settled under the life income option with installments guaranteed for 120 months, the Administrator estimated that potential liability under respondent's view of the statute might be about 97 billion dollars, instead of 35 billion dollars (the potential liability under Regulation 3450)—an increased future liability of 62 billion dollars. And if 10% of all lapsed policies were reinstated, the potential additional liability (on the basis of the above assumptions) would be about 19.7 billion dollars.

While these assumptions may be overly favorable to the Government's contentions and may not be fully borne out by the course of future events, it is obvious—even allowing for a wide margin of error—that the added potential liability under the holding of the Circuit Court of Appeals might well amount to billions of dollars.

the age of the first beneficiary is used by the regulation as the basis of an actuarial calculation pursuant to a formula whereby total payments under § 602 (h) (2) approximate the face value of the policies, plus interest. The extent of the difference in result is indicated by the table, set forth in the margin,[18] of comparative present values of the monthly installments under the regulation and under the view of the Circuit Court of Appeals, taking into account the beneficiary's life expectancy as shown by the American Experience Table of Mortality.

The Circuit Court thought it probable that Congress originally intended the higher rate of benefit payments to be restricted to the beneficiaries covered by § 602 (h) (2) because that group of persons over 30 at the time of the serviceman's death would include parents, who would be at least middle-aged, and "young widows with small children whose ten years of monthly payments would end at the most needed time." [19] This would hardly serve to explain, however, why Congress would intentionally discriminate in so substantial a manner against a similarly deserving but slightly younger widow in the under-thirty category by failing to extend comparable benefits to the latter group.

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[18]

Beneficiary's age	*Present value under Regulation 3450*	*Present value under C. C. A. 7 view*
10	$1,000	$2,786
20	1,000	2,633
30	1,000	2,421
40	1,000	2,136
50	1,000	1,783
54	1,000	1,629
60	1,000	1,411
70	1,000	1,129

See Appendix D of the Government's brief for the mathematical formulae used in constructing this table.

[19] Transcript of Record, p. 10.

The disparity in benefits available under the respondent's view, as contrasted with those available under the regulation, is reflected in a correspondingly large increase, under the former view, in the total liability for beneficial payments.[20] This greatly enhanced liability could be met, theoretically, in either of two ways: by special congressional appropriations, or by greatly increased premium rates substantially above those which are now set by the Veterans' Administration on the assumption that the regulation is proper.

The Circuit Court of Appeals was of the opinion that Congress intended the Government to bear the burden of this extraordinary liability. By express provisions in the 1940 Act, Congress specified that the United States would bear the administrative costs of the insurance system,[21] excess mortality and disability cost resulting from the extra hazards of war,[22] and the cost of reimbursing the reserve fund for waiving recovery of benefit payments erroneously made where it would be inequitable to require repayment.[23] Congress obviously contemplated that the reserve fund to meet the liabilities of National Service Life Insurance policies was to be self-supporting, sustained by the premiums paid and by the yield of premiums invested, in all respects aside from those exceptional situations where the statute specifically designated that the Government would bear the financial burden. Yet Con-

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[20] Under the respondent's view, this extraordinary putative liability must be considered to have been tremendously increased by the extension of the § 602 (h) (2) method of payment to all beneficiaries by the 1946 amendment which removed the limiting age factor. See note 15 *supra*.

[21] § 606, 38 U. S. C. § 806.

[22] § 607 (a), 38 U. S. C. § 807 (a).

[23] § 609, 38 U. S. C. § 809. Subsequent amendments to the 1940 Act added other specified costs to be borne by the United States. See, *e. g.*, 38 U. S. C. (Supp. V, 1946) § 802 *et seq.*

gress nowhere specified that the United States would bear the huge cost of the enhanced liability that it would necessarily have anticipated had it impressed upon § 602 (h) (2) the meaning that respondent finds there; and that striking omission is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated.[24]

Nor can it be assumed that Congress envisaged the setting of premium rates high enough to meet an added liability of such proportions. Senator Harrison, who was in charge of the original bill, informed the Senate that "Premium rates based on the average age—25 years—will be 67 cents per thousand per month." [25] Such a rate, though adequate to cover payments under Regulation 3450, would be completely inadequate under the respondent's construction.

Moreover, whatever ambiguity exists in the language of § 602 (h) (2) is dispelled by a consideration of the practice in effect under United States Government Life Insurance, established for World War I veterans, and the long-established practice of commercial insurance companies, viewed as part of the background of experience which the draftsmen of § 602 (h) (2) may be assumed to have had in mind.

The World War Veterans Act, 1924,[26] provided for payment of insurance benefits in 240 equal monthly installments, but authorized the Veterans' Administration (formerly the Veterans' Bureau) to provide in the contract

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[24] *Cf.* the reasoning of the Court, speaking through Mr. Justice Holmes, in *Pine Hill Coal Co.* v. *United States,* 259 U. S. 191, 196 (1922): "A liability in any case is not to be imposed upon a government without clear words. . . . and where, as here, the liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed. . . ."

[25] 86 Cong. Rec. 12920 (1940).

[26] Title III, 43 Stat. 607, 624, as amended, 38 U. S. C. § 512.

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of insurance "for optional settlements, to be selected by the insured, whereby such insurance may be made payable either in one sum or in installments for thirty-six months or more. . . ." One of the options, set up by Regulation 3068 under this statutory authorization, provided that monthly installments in amounts designated in an appended table—the amounts being graduated, just as in Regulation 3450, with the "age of beneficiary at time of death of the insured"—"will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before 240 such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy." [27]

It seems apparent to us that the congressional draftsmen, in framing § 602 (h) (2), were undoubtedly striving to incorporate into the 1940 Act a provision modeled on the life-annuity-with-240-payments-certain option set up by Regulation 3068 under the World War Veterans Act of 1924, deviating materially only in the number of payments guaranteed. True, § 602 (h) (2) does not itself define expressly the method of computation to be used by the Administrator in determining the size of the monthly installments in any given case. But, taking into account the factors previously set forth and considering them against the background of experience under the 1924 Act, the only reasonable conclusion is that Congress intended the calculation to be an actuarial one, based on the age of the beneficiary. To subscribe to the opposite conclusion, we must believe that Congress intended, by its wording of § 602 (h) (2), to bestow upon beneficiaries of World War II servicemen total payments completely disproportionate to those available to beneficiaries of World War I servicemen. To believe that

[27] 38 C. F. R. 10.3068.

Congress, by the enactment of a somewhat ambiguous provision, intended this disproportionate result along with the other disparities that have been shown to be required by the respondent's view, puts too great a strain upon the imagination.

Moreover, the congressional draftsmen of § 602 (h) (2), with the example before them of the 1924 Act and the similar practice of standard commercial insurance companies, undoubtedly considered that even the very wording of that subsection, without more, necessarily implied that the Administrator was to follow the existing practice in calculating the size of the monthly installments. As previously noted, the term "certain" appearing in the phrase "equal monthly installments for one hundred and twenty months certain" is a technical word that connotes, because of the context in which it is commonly used in standard commercial policies, an actuarial calculation of the monthly installments payable.

For example, one of the standard life insurance policies used in 1940 provided for a life income option to be "Made payable in equal annual, semi-annual, quarterly or monthly instalments for ten or twenty years certain, with payments continuing during the remaining lifetime of the person upon whose life the income depends . . . . The first instalment will be due upon the date on which the option becomes operative. The amount of such instalments shall be determined in accordance with the table of instalments on the following page, which instalments include interest at the rate of 3% per annum, and shall be based on the sex and the age at birthday nearest the due date of the first instalment, of the person upon whose life the income depends. . . ." [28] Another example, closer to the concise form of § 602 (h) (2),

[28] *The Handy Guide to Standard and Special Contracts* (1940) 294.

though using the term "fixed" rather than "certain," is an option which provides for "the payment of equal monthly instalments in accordance with the table below [a table whose payments are graduated in amount with respect to the "Age of Payee Nearest Birthday at Date of First Instalment"], to the insured or the beneficiary, as the case may be, for a fixed period of ten years and for so long thereafter as the payee shall survive, the first instalment being payable immediately." [29]

Congress may also have assumed that its intent was made manifest by the juxtaposition of § 602 (h) (2) with other provisions having similar connotations. Section 605 (b), for example, authorizes the Administrator "to set aside out of [the National Service Life Insurance Fund] such reserve amounts *as may be required under accepted actuarial principles, to meet all liabilities* under such insurance . . . ." (Italics added.) And § 602 (e) provides that the premium rates, all "cash, loan, paid up, and extended values, *and all other calculations in connection with such insurance, shall be based upon said American Experience Table of Mortality* and interest at the rate of 3 per centum per annum." (Italics added.)

In any event, the subsequent legislative history of the

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[29] *Id.* at 613.

A third illustration provides in the following terms for an election between a plan similar to that provided by § 602 (h) (2) as construed by Regulation 3450, and the refund life income plan provided by the 1944 amendment to the statute (see note 33 *infra*): "The company will pay equal monthly instalments during the payee's remaining life, with 120 or 240 instalments certain or with instalments certain until the proceeds are refunded, as may be designated in the election of the option, the amount of each instalment to be determined from the table entitled 'Option 4—Life Income With Instalments Certain' in accordance with the sex of the payee and the age of the payee at the payee's birthday nearest to the date when the proceeds of this policy shall become payable, the first of said instalments to be payable immediately. . . ." *Handy Guide, supra* note 28, at 983. See also *id.* at 1284–85.

statute clearly indicates congressional approval of the construction put upon § 602 (h) (2) by Regulation 3450. A proposed bill was suggested in a letter written by the Administrator of the Veterans' Administration to Congress in June, 1944, to amend §§ 602 (h) (1) and 602 (h) (2) of the 1940 Act by authorizing "the election of a refund life income in lieu of the mode of payments now provided." [30] In explaining the necessity of the amendment, the Administrator pointed out that if "a widow having a minor child, who is entitled to payments as provided in section 602 (h) (2), dies after having received one or more installments of insurance, payments under the contract will cease after payment of 120 installments has been completed *even though the total amount of the installments paid or payable is less than the face value of the policy* and even though the child is too young to be capable of self-support at the time payments expire. The proposed amendments will authorize the payment of the full face value of the insurance *in every instance* and will also insure an income throughout the lifetime of the first beneficiary under the policy." [31]

In other words, the amendment was proposed partly to extend a life income option to beneficiaries covered by § 602 (h) (1), who theretofore had been eligible only for the 240-payment plan, and partly to provide a solution for the inequitable situation presented in certain cases covered by the provisions of § 602 (h) (2), when the 120 installments certain amounted to less than the face value of the policy and the first beneficiary died before having received an amount equal to that face value. The inequitable situation thus considered to be present under § 602 (h) (2) and sought to be ameliorated by the proposed amendment could not have existed, of course,

[30] S. Rep. No. 1105, 78th Cong., 2d Sess. 2, quoting the Administrator's letter.

[31] *Id.* (italics added).

if the Circuit Court of Appeals were correct in the construction it has put upon § 602 (h) (2).

The Senate Committee on Finance, in recommending passage of the bill, adopted the Administrator's letter as explanatory of the various provisions of the bill [32] and indicated thereby its approval of the interpretation embodied in Regulation 3450, since otherwise a major purpose claimed to be effected by the amendment would have been completely illusory. Moreover, a table included in the Administrator's letter, comparing the amount of each monthly installment and the sum of the guaranteed installments under the new refund life income plan and under § 602 (h) (2), clearly apprised Congress of the construction put upon the latter section by the regulation. Hence, in enacting the amendment [33] Congress indicated its approval of the interpretation upon which the Regulation is based.[34]

Similar recognition that in many instances "the aggregate amount of insurance actually payable" under the original mode of settlement provided by § 602 (h) (2)

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[32] *Id.* at 1.

[33] Section 6 of the 1944 Act, 58 Stat. 762, 763, amended § 602 (h) (2) by providing that the Administrator "may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract less any indebtedness with such payments continuing throughout the lifetime of such beneficiary: *Provided further,* That such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months, nor in any case in which payments of insurance installments have been commenced prior to the date of this amendatory Act." Section 5 of the 1944 Act added a similar amendment to § 602 (h) (1).

[34] Cf. *Alexander* v. *Mayor,* 5 Cranch 1, 7–8 (1809).

"amounted to much less than the face of the policy" was given by the House Committee on World War Veterans' Legislation, in recommending a 1946 amendment to permit policies on which payments had been made prior to the 1944 act to elect the refund life income plan.[35] The 1946 bill also included a provision setting up optional modes of settlement for insurance maturing on or after August 1, 1946, and the third option was couched in language identical in every significant respect to that used in the original § 602 (h) (2).[36] Accordingly, when Congress enacted the 1946 bill, it in effect incorporated the old provision of § 602 (h) (2), which was the basis for Regulation 3450, and in our view thereby accepted the construction embodied in that regulation, which had been so clearly brought to its attention on this and prior occasions.

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[35] H. R. Rep. No. 2002, 79th Cong., 2d Sess. 5. The measure was approved by Congress, and § 5 (a) of the Act amends § 602 (h) (1) and (2) as indicated. 60 Stat. 781, 782–3.

[36] Section 9 of the Act added to § 602 a new subsection (t), reading as follows: "Insurance maturing on or subsequent to the date of enactment of the Insurance Act of 1946 shall be payable in accordance with the following optional modes of settlement:

"(1) In one sum.

"(2) In equal monthly installments of from thirty-six to two hundred and forty in number, in multiples of twelve.

"(3) In equal monthly installments for one hundred and twenty months certain with such payments continuing during the remaining lifetime of the first beneficiary.

"(4) As a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary: *Provided*, That such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months. . . ."

Further evidence, were any needed, that Congress accepted as its own this interpretation of the language used in § 602 (h) (2) is supplied by the significant distinction maintained in this reenactment between the mode of payment originally provided by § 602 (h) (2) and the refund life income plan, viewed in the light of the House Committee Report on the bill. It is hardly conceivable—and if conceivable, hardly explicable—that Congress meant one thing by the language it used in § 602 (h) (2) when enacting the original measure in 1940, and another, quite different thing, when it reenacted that language in 1946.

In the light of the foregoing considerations, the validity of Regulation 3450 is sustained and the decision of the Circuit Court of Appeals is

Reversed.

UNITED STATES *v.* JOHN J. FELIN & CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 17. Argued May 7, 1947.—Reargued November 18–19, 1947.—Decided June 14, 1948.

When prices of pork products (but not live hogs) were fixed under the Emergency Price Control Act, the Government ordered from a packer a quantity of four particular pork products for war purposes. The packer refused delivery at ceiling prices and the products were seized by the Government. Under a statutory procedure, an administrative agency awarded compensation at ceiling prices; this was refused; and the packer was paid half the amount due at ceiling prices on account. In a suit by the packer for "just compensation" under the Fifth Amendment, the Court of Claims found as a fact that the replacement cost of the seized products at the time and place of the taking was substantially in excess of the ceiling prices and awarded judgment for the difference between the amount paid and what it found to be the replacement value of such products. The packer failed to prove that it had suffered any actual loss on the particular products seized. On appeal to this Court, *held:* Judgment reversed with directions to enter judgment for the unpaid balance of the value of the products

at ceiling prices, with interest on the total value at ceiling prices from the date of the taking to the date of the final administrative award. Pp. 625–642.

107 Ct. Cl. 155, 67 F. Supp. 1017, reversed.

The Court of Claims awarded a pork packer judgment for the difference between the amount paid (based on O. P. A. ceiling prices) for certain pork products seized by the Government and their replacement value. 107 Ct. Cl. 155, 67 F. Supp. 1017. This Court granted certiorari. 330 U. S. 814. *Reversed with directions,* p. 642.

Assistant Solicitor General Washington argued the cause for the United States. With him on the brief were *Assistant Attorney General Sonnett, Paul A. Sweeney* and *Harry I. Rand.*

Arthur L. Winn, Jr. argued the cause for respondent. With him on the brief were *Wilbur La Roe, Jr.* and *Frederick E. Brown.*

MR. JUSTICE FRANKFURTER announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE BURTON concurred.

This is a claim for just compensation, based on the Fifth Amendment, by a slaughterer whose meat products the Government requisitioned for war purposes. The Court of Claims awarded damages above the maximum prices fixed by the Office of Price Administration for such products and measured by what that court deemed the replacement cost of the requisitioned property. 107 Ct. Cl. 155, 67 F. Supp. 1017. The implications of this ruling reach far, and so we brought the case here. 330 U. S. 814.

While the immediate facts of this controversy are few and undisputed, they can be understood only in connection with the recognized facts in the meat industry. Of these we must take judicial notice inasmuch as we must

translate the idiom of the industry into vernacular English. Also, of course, we must consider the facts in the context of the rather intricate system of meat price regulation by O. P. A.

The respondent was engaged in the business of packing pork products in Philadelphia. It bought hogs in Chicago, St. Louis, and Indianapolis and transported them to Philadelphia where they were slaughtered and converted into various pork cuts and products. It sold these products to retail dealers in Philadelphia, and it had also supplied pork products to Government agencies.

On January 30, 1942, the President approved the Emergency Price Control Act. 56 Stat. 23, 50 U. S. C. App. (Supp. V, 1946) § 901. Accordingly, the Price Administrator, by a series of regulations, established maximum prices for dressed hogs and wholesale pork cuts. Revised Maximum Price Regulation No. 148, issued on October 22, 1942, governed the pork cuts here involved. 7 Fed. Reg. 8609, 8948, 9005; 8 Fed. Reg. 544.

To meet the food needs entailed by the war, the President under the authority of the Second War Powers Act, 56 Stat. 176, 50 U. S. C. (Supp. V, 1946) § 633, created the Food Distribution Administration, with the Secretary of Agriculture as its head. E. O. 9280, 7 Fed. Reg. 10179. This Administration was given authority to assign food priorities, to "allocate" food to governmental agencies and for private account, and to assist in carrying out the program of the Lend-Lease Act of March 11, 1941, 55 Stat. 31. To carry out the task thus delegated by the President, the Food Distribution Administration issued to each packer operating under federal inspection a priority order calling for delivery of a proportionate part of the total quantity needed at the particular time.[1] A packer's

[1] In 1943 there were 308 hog slaughterers whose establishments operated under federal inspection. Livestock, Meats, and Wool Market Statistics and Related Data 1945, compiled by the Livestock

quota was based on the ratio of meat produced in his plant to the total production in all federally inspected plants.

In conformity with this system, the respondent, on February 2, 1943, was requested to deliver 225,000 pounds of lard and pork products to the Federal Surplus Commodity Corporation for delivery under the Lend-Lease program. The respondent was advised that this order was to be filled in preference to any other order or contract of lower priority, and at the applicable O. P. A. ceiling prices. Insisting that it could no longer afford to sell to the Government at ceiling prices, respondent refused to make delivery.

On March 1, 1943, the Food Distribution Administration, exercising powers not questioned, issued an order requisitioning the lard and pork products in controversy.[2] On March 3, 1943, the property was duly seized in respondent's Philadelphia packing house. On March 24, 1943, respondent filed its claim with the Administration for "just compensation" for taking this property. Its total claim was $55,525, of which $16,250 was for lard and $39,275 for pork cuts. On May 7, 1943, the Administration, by way of preliminary determination of the just compensation for the requisitioned property, fixed the value of the lard at $15,543.78 and the pork cuts at $25,112.50. These amounts were based on the O. P. A.

Branch, Production and Marketing Administration, United States Department of Agriculture, p. 31. In 1942 there had been only 218 hog slaughtering establishments under federal inspection, and in 1944 there were 322. *Ibid.*

[2] The requisitioned property consisted of the following:

40,000 pounds Cured Regular Hams, 14 to 18 lb. range
40,000 pounds Cured Clear Bellies, 10 to 14 lb. range
15,000 pounds Cured Picnics, 6 to 10 lb. range
30,000 pounds Salted Fatbacks, 8 to 12 lb. range
100,000 pounds Refined Pure Lard, 1 lb. prints (30 lbs. to carton)

ceiling prices applicable to these products. On May 22, 1943, the preliminary award was made final. Respondent accepted in full payment the award as to the lard; it refused to accept the determination as to the pork cuts and, in accordance with the statutory procedure in the case of rejection of such an award, was paid half of it. On June 24, 1943, respondent instituted this action in the Court of Claims to recover the additional amount which when added to the $12,556.25, the half of the Government's valuation for those cuts, would constitute "just compensation" for what the Government had taken.

The Court of Claims referred the proceeding to a commissioner, who took evidence and reported to the court. Upon the basis of his report and the underlying evidence, the Court of Claims found as a fact that the replacement cost of the requisitioned pork cuts at the time and place of the taking was $30,293, and concluded, as a matter of law, that such replacement cost and not the maximum ceiling price was the proper measure of damages for the taking. We heard argument at the last Term, and after due consideration deemed it appropriate to order reargument at this Term.[3]

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[3] After the case was taken under advisement, following reargument, a matter was brought to our attention which calls for consideration, however summary. We were advised that on March 23, 1943, the respondent filed with the O. P. A. an "Application for Adjustment of Maximum Prices for Commodities or Services under Government Contracts or Subcontracts," pursuant to Procedural Regulation No. 6, 7 Fed. Reg. 5087, and Supplementary Order No. 9, 7 Fed. Reg. 5444. (See 7 Fed. Reg. 5088 for the form of the application.) The purpose of these regulations was to afford opportunity for relief to sellers who had made, or proposed to make, "contracts or subcontracts" with the Government. This application had lain dormant from the date of its filing until December 13, 1947, when we were advised by counsel for the Government that it was now in the files of the Reconstruction Finance Corporation, which is third in the chain of title from the O. P. A., through the Office of Temporary Controls, charged with the administration of these two regulations. On December 15, 1947,

At the outset it is important to make clear what it is we are called upon to decide. The conventional criterion

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counsel for the respondent advised the R. F. C. that it withdrew the application insofar as it pertained to the requisitioned commodities in controversy here.

While the Government does not suggest that the dormancy of this application renders present proceedings, if not moot, premature, such apparently is the intimation. If the regulations in fact authorized one who is not a "contractor or subcontractor" in the ordinary meaning of those terms to obtain special administrative relief apart from the statutory scheme relating to requisitioned property, technical issues would have to be faced which we need not particularize. Counsel for the Government advise us that a counsel for the R. F. C. has now interpreted the regulations not only (1) as applicable to requisitioned commodities, but (2) as authorizing retroactive price adjustments for requisition transactions completed before readjustment is sought. Not unnaturally, the Government states that the applicability of this procedure for readjustment "to requisitioned commodities may not be readily apparent from its terms." While normally we accept the construction placed upon a regulation by those charged with its administration, we must reject a construction that is not only as unnatural as what is now proposed but comes to us *post litem motam* five years after the application. It should also be pointed out that the construction now placed upon the regulations is not made by the administration that promulgated it but by the second successor agency for liquidating what is left of this administration. With due regard for the respect we owe to administrative rulings in their normal setting, it would require such a remaking of the regulations as reason and fair dealing here reject. The provisions for readjustment of contracts relate to a transaction in which the seller and the purchasing agency of the Government were in agreement as to the contract price. The price was paid, subject to the approval of the application for adjustment. If so approved, the seller retained the purchase price; if disapproved, the seller had to make a refund. See *Armour & Co.* v. *Brown,* 137 F. 2d 233, 240. In the case of a requisitioned commodity, certainly prior to the filing of an application, no amount is agreed upon, and no provision for refund has been made. In short, we reject this belated and novel construction and are of the opinion that the pendency of this moribund application before the R. F. C., now withdrawn by the respondent, was no bar to this suit.

for determining what is "just compensation" for private property taken for public use is what it would bring in the free, open market. *E. g., Olson* v. *United States,* 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *L. Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340. But there must be a market to make the criterion available. Here there was a market in which the respondent could have sold the pork cuts, but it was not a free and open market; it was controlled in its vital feature, selling price, by the O. P. A. It is this fact that creates the problem of the case, assuming that the case is not dogmatically disposed of by holding that inasmuch as the maximum price is the only price which respondent could legally have got for its goods it is just compensation. We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of "just compensation" whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case.

The Second War Powers Act, 1942, under which respondent's property was authorized to be taken, restricted compensation for the taking to that which the Fifth Amendment enjoins. 56 Stat. 176, 181. In enforcing this constitutional requirement "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern* v. *New York,* 229 U. S. 363. Respondent's sole claim is for the pecuniary equivalent of the property taken. This is not a situation where consequential damages, in any appropriate sense of the term, are urged as a necessary part of just compensation. Respondent does not claim such damages on the theory that, in order to protect its good will, it had to supply its regular customers and that this compelled replacement of the requisitioned pork products by the purchase, slaughter,

and processing of live hogs.[4] Cf. *United States* v. *General Motors Corp.*, 323 U. S. 373, 382; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–78; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–82. Respondent claims that replacement cost is the proper measure of the value of the property when requisitioned. This action was brought to recover damages which the respondent would suffer, so it maintains, if it accepted the Government's offer of the applicable ceiling prices in satisfaction of "just compensation." The burden therefore rests on the respondent to prove the damages it would suffer by not receiving more than the ceiling prices. *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280, 285.

The Court of Claims found that the principal item in the cost of processing respondent's products was what it had to pay for live hogs; that, inasmuch as live hogs were not then covered by price regulation, the Chicago market quotations governed price in the packing industry; that the Chicago average live hog price was $15.59 during March 1943;[5] and that, on the basis of this price, the

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[4] If the respondent had sold the pork products in controversy here to its regular customers, it would have done so at the applicable ceiling prices. If the Government had then requisitioned the property from these customers, there would have been no question that the ceiling prices would have been the measure of just compensation.

[5] This was obviously not the cost of the hogs from which the pork products requisitioned by the order of March 1, 1943, were processed. The relevant hogs were purchased in some previous month and at a lower cost. The Chicago average was $15.35 in February and $14.78 in January, 1943, and $14.01 in December and $13.96 in November, 1942. Livestock, Meats, and Wool Market Statistics and Related Data 1945, compiled by the Livestock Branch, Production and Marketing Administration, United States Department of Agriculture, p. 54. Moreover, these were the average prices for average weights of hogs. *Ibid.* The Government took specific pork products which

replacement cost for the requisitioned property was $30,293. We are of opinion that in reaching this conclusion the court below failed to take into account decisive factors for the proper disposition of the action brought by the respondent.

We are dealing with a claim for damages arising out of a transaction pertaining to a particular industry, and the transaction cannot be torn from the context of that industry. It is practically a postulate of the slaughtering industry that replacement cost does not afford a relevant basis for determining the true value of the industry's products. "Manufacturing operations in the meat packing industry do not consist of assembling raw materials for the purpose of obtaining one finished product, but rather of separating or breaking down raw materials (cattle, etc.) into many parts, one of which (dressed carcass) is the major product, and the other parts of which are further processed into numerous byproducts." *Kingan & Co.* v. *Bowles,* 144 F. 2d 253, 254. In consequence, cost in the industry generally is like a fagot that cannot be broken up into simple, isolated pieces. See Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of the Institute of American Meat Packers), *passim.* "The accounting procedure in the hog business is even more complicated than that of the cattle, calf, or sheep business, because the operations involve a greater breaking up of the dressed carcass and more numerous processes extending over considerable periods of time." *Id.* at 33–34. The problem is one of "joint cost" in a business which "produces no single major product," *id.* at 213, with the result that no accountant has thus far "been able to devise a method yielding

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were processed from hogs of a definite weight for which the respondent paid specific prices in the Chicago, St. Louis, or Indianapolis markets.

by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork." Hamilton, *Cost as a Standard for Price,* 4 Law and Contemp. Prob. 321, 328; cf. Greenbaum, *The Basis of Property Shall Be the Cost of Such Property: How is Cost Defined?,* 3 Tax L. Rev. 351, 356–59.

If, as suggested in argument, a hog were nothing but an articulated pork chop, and the processing of edible and inedible by-products were not characteristic of the industry, the price of a live hog might well represent the collective cost of the derivative pork cuts. The pork chop, however, is but one of the many edible hog products. According to an estimate about the time of the requisitioning of these pork cuts, there were more than 200 pork items (exclusive of sausage products) in the market. See Supplementary Statement of Considerations for Revised Regulation No. 148, Pike and Fischer, 3 OPA Food Desk Book 46,151. "Most pork products," the Administrator found, "are consumed in a cured or processed state. Fresh pork products, such as pork chops and fresh ham, represent not over 20 per cent of the vast quantity of pork which moves by rail. The remaining 80 per cent reaches the consumer in a wide variety of processed forms, including dried, dry cured, sweet pickled, smoked, cooked, baked, and canned." *Id.* at 46,141. It deserves noting that the requisitioned products in controversy included cured regular hams, cured clear bellies, cured picnics, and salted fatbacks.

The petitioner was also engaged in by-product processing,[6] for the Government took from him 100,000 pounds

[6] There are "numerous by-products," and the computation of the values for "such by-products as casings, grease, fertilizer, and hog hair, is rather complex." Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of the Institute of American Meat Packers) (1929) at 213 and 219, respectively; see, generally, Clemen, By-Products in the Packing Industry (1929); Moulton and Lewis,

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of refined pure lard. For the value of the lard the respondent accepted the administrative award.[7] Admittedly, part of the cost of the live hog must be charged to by-products. However, any method of apportioning the total cost to the by-products is highly speculative.[8]

Since so much speculative approximation and guesswork entered into the determination of cost, selling price, and profit, the industry, naturally enough, was in almost continuous controversy with the Price Administrator about them. The respondent was party to these controversies. On July 17, 1942, it filed a protest against Maximum Price Regulation No. 148 which was consolidated

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Meat through the Microscope (rev. ed. 1940); Readings on By-Products of the Meat Packing Industry, collected by the Institute of Meat Packing, University of Chicago (1941); Rhoades, Merchandising Packinghouse Products, Institute of Meat Packing, University of Chicago (1929); Tolman, Packing-House Industries (1922).

[7] Since, as we hold, the value of the individual products can only be determined by proportionate allocation from the over-all operations, it seems to us that respondent's acceptance of the award as to the lard was hardly consistent with its rejection of the award as to the other pork products.

[8] "On much of the material transferred [from one of the slaughterer's departmental accounts to another], such as blood, bones, tankage, glue stock, etc., there is no ascertainable outside market, and the packers must perforce place quite arbitrary valuations on this material having no probable relation to either cost or market. Again certain products are in the green stage when transferred, and an outside market only obtains for the finished stage, with the result that arbitrary deductions must be made from the finished market, estimated to establish a nonexistent 'green' market. The certification of internal transfer prices presents, accordingly, an almost interminable problem to any outside reviewing body." Report of the Federal Trade Commission on the Meat-Packing Industry (1920), Part V, 56. The industry's position as to the utilization of such cost allocations and the Price Administrator's objections thereto are quoted fully and discussed in *Armour & Co.* v. *Bowles,* 148 F. 2d 529, 535–39.

with the protest of 115 other pork slaughterers against this regulation. On the basis of calculations as to the cut-out value or replacement cost of various pork cuts, the slaughterers contended that the regulation did not allow them sufficient operating margin over the cost of live hogs. In rejecting the protest, on April 23, 1943, the Administrator made this ruling: "The interdependence of all phases of the operations of packing establishments makes precise evaluation of the relationship between prices on dressed and processed meats and live hog prices impossible except in terms of the over-all financial position of the industry." *In the Matter of Rapides Packing Co.,* Pike and Fischer, 1 OPA Opinions and Decisions 243. The respondent, on March 8, 1943, had also protested, again on the basis of the cost of live hogs, against the revision of the regulation. This protest was consolidated with those of 15 other pork slaughterers and, substantially on the ground taken in the *Rapides Packing Co.* case, this second protest was likewise rejected by the Administrator. *In the Matter of Greenwood Packing Plant,* Pike and Fischer, 1 OPA Opinions and Decisions 296, 299.

Review by the Emergency Court of Appeals was not sought,[9] although the first denial of respondent's claim for the replacement cost of pork cuts, based on live hog prices, came shortly after the Government's requisitioning of the products as to which he now makes the same contention. It is noteworthy that the pork price margins were almost the only meat price margins which were not challenged before the Emergency Court of Appeals in

[9] It is also significant that none of the other 130 protestants sought review in the Emergency Court of Appeals. Cf., *e. g., Kingan & Co.* v. *Bowles,* 144 F. 2d 253, and *Armour & Co.* v. *Bowles,* 148 F. 2d 529, for that court's views on replacement cost as a basis for the determination of value.

what has been called "the battle of the meat regulations." See Hyman and Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations,* 42 Ill. L. Rev. 584.

The considerations which underlay the Administrator's meat price determinations are most pertinent to the solution of our immediate problem. The result of his analysis was that the profit-and-loss data on a slaughterer's entire operations were the only dependable figures from which the fairness of meat prices could be deduced. The Administrator pointed out that the industry, on the basis of its accounting figures, had historically lost money on its meat sales.[10] Since, however, by taking the by-product sales into full account its operations as a whole were highly profitable, these meat sale losses were "more in the nature of bookkeeping losses which failed to take fully into account the integrated nature of the industry." These views were approvingly quoted by the Emergency Court of Appeals in *Armour & Co.* v. *Bowles,* 148 F. 2d 529, 535.

In both of the consolidated proceedings to which the respondent was a party, the Administrator explicitly requested to be furnished with the industry's profit-and-loss data. In the earlier proceeding, no proof of loss was filed by any of the protestants. *In the Matter of Rapides*

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[10] "It is a notable fact, that according to the present method of departmental accounting, the packers are in the habit of showing low profits or even positive losses in the carcass-meat departments, while at the same time exhibiting large profits in the by-products or 'specialty' departments, the chief reason for this somewhat extraordinary state of affairs being found in the valuations placed upon transfers." Report of the Federal Trade Commission on the Meat-Packing Industry (1920), Part V, 56. While a great deal of time has passed since this 1920 report, the Price Administrator reached the same conclusions in 1943, and the Emergency Court of Appeals quoted the report more fully in 1945. See *Armour & Co.* v. *Bowles,* 148 F. 2d at 537.

Packing Co., supra. In the second proceeding the Administrator made this finding:

> "The three Protestants who submitted further evidence did not even thus sustain their claims of individual hardship. One of them showed a net profit of $60,492.44 for the five months period ending March 27, 1942; another a net profit of $6,838.00 for the three months period ending April 1, 1943, and the third failed to submit a profit and loss statement and balance sheet although specifically requested to do so." *In the Matter of Greenwood Packing Plant, supra,* at 297.

Not merely does the industry generally seem to have prospered under price control,[11] but so did the respond-

[11] See War Profits Study No. 14, Office of Research, Financial Analysis Branch, Office of Price Administration, Office of Temporary Controls (1947) pp. 17, 45–47, 73–75. This is a study of the profits of 520 food processors, but the foregoing references were to the separate tabulations concerning the 79 meat packers included in the study. The financial data was compiled from Moody's Industrials, Standard & Poor's Corporation Records, and the OPA Financial Reports submitted by the packers. *Id.* at 19. Of the total 79 meat packers, 54 are processing slaughterers, 10 non-processing slaughterers, and 15 non-slaughterers. The comparison between the 1943 operations and the base period (1936–39 average) operations shows for the 54 processing slaughterers: *Net sales:* 1943—$4,575,528,000 (after renegotiation refunds)/base period—$2,382,211,000; *Profits before income taxes:* 1943—$125,463,000 (after renegotiation refunds)/base period—$24,415,000; *Profits after taxes:* 1943—$50,402,000 (after renegotiation refunds)/base period—$19,255,000; *Return on sales:* 1943—2.7%/base period—1.0%; *Return on net worth:* 1943—19.5%/base period—4.1%; *Return on invested capital:* 1943—16.5%/base period—4.1%. *Id.* at 45, 47. For the 10 non-processing slaughterers, the comparison shows: *Net sales:* 1943—$62,098,000/base period—$29,927,000; *Profits before income taxes:* 1943—$1,027,000/base period—$184,000; *Profits after taxes:* 1943—$390,000/base period—$147,000; *Return on sales:* 1943—1.7%/base period—.6%; *Return on net worth:* 1943—28.0%/base period—6.3%; *Return on invested capital:* 1943—25.5%/base period—5.9%. *Ibid.*

ent [12] despite the fact that throughout the period in controversy it continued to buy live hogs at prevailing prices and to sell pork products derived from them at the authorized ceiling prices, even when this meant selling its pork products below the price that the Court of Claims found to be their replacement cost value.[13]

Most pertinent, therefore, are the pronouncements of the packing industry made before these matters became embroiled in price-fixing litigation. "The cost of a dressed hog carcass, or of a lot of dressed hog carcasses, may be determined quite satisfactorily; but when a carcass is cut up into its various merchantable parts, all record of cost is lost, as it is impossible to determine the cost of any of these cuts." Greer, Packinghouse Accounting (Prepared by the Committee on Accounting of

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[12] Respondent's income account for the year ending December 31, 1943, shows:

"Net sales	$14,225,056	
Cost of sales	12,950,785	
Selling, etc., exp	869,770	
Operating profit	404,500	
Other income	18,717	
Total income	423,217	
Misc. deductions	13,229	
Income taxes	176,619	
Net income	233,369	
Earn., pfd. share		$40.21
Earn., com. share		17.97"

See Moody's Manual of Investments, American and Foreign, Industrial Securities, 1944, p. 647. The 1943 net income figure of $233,369 compared favorably with preceding years: 1942—$73,292; 1941—$150,069; 1940—$148,164; and 1939—*d$76,936*.

[13] The court below found that in order to protect its good will and keep its organization intact, "Throughout the period mentioned [prior to and after the March 1943 requisition], plaintiff [respondent] continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by regulations of the Office of Price Administration, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them." 67 F. Supp. at 1022.

the Institute of American Meat Packers), p. 246, and also pp. 43, 58, 61–62. Since the "results for the hog business as a whole can be found only by adding the profits or losses for all merchandising departments," *id.* at 218, the only accurate formula for costs in hog slaughtering is a profit-and-loss statement for the entire operations. *Id.* at 43–44.

It is as old as the common law that an allegation purporting to be one of fact but contradicted by common knowledge is not confessed by a demurrer.[14] Of course, findings of fact are binding on this Court, but if this Court had to treat as the starting point for the determination of constitutional issues a spurious finding of "fact" contradicted by an adjudicated finding between the very parties to the instant controversy, constitutional adjudication would become a verbal game.

There are facts and facts, even in Court of Claims' litigation. It is the function of the Court of Claims to make findings. But when a judgment based on such findings is here brought in question it is the function of this Court to ascertain the meaning of the findings in order to determine their legal significance. The judgment of the court below that "replacement cost" is the proper measure of just compensation and the mode by which it reached the amount of that cost are inescapably enmeshed in considerations that are clearly familiar issues of law and particularly of constitutional law. Where the conclusion is a "composite of fact and law," *Cedar Rapids Gas Light*

[14] "If one enters my close, and with an iron sledge and bar breaks and displaces the stones on the land, being my chattels, and I request him to desist, and he refuses, and threatens me if I shall approach him; and upon this I, to prevent him from doing more damage to the stones, not daring to approach him, throw some stones at him *molliter et molli manu*, and they fall upon him *molliter*, still this is not a good justification, for the judges say that one cannot throw stones *molliter*, although it were confessed by a demurrer . . . ." *Cole* v. *Maunder*, 2 Roll. Abr. 548 (K. B. 1635) (as translated from the Norman French in Ames, Cases on Pleading (1875) 2).

Co. v. *Cedar Rapids,* 223 U. S. 655, 668, this Court may certainly hold that as a matter of law the findings are erroneous. See, *e. g., Washington ex rel. Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 528. Even when this Court reviews State court judgments involving constitutional issues it "must review independently both the legal issues and those factual matters with which they are commingled." See *Oyama* v. *California,* 332 U. S. 633, 636 (and the authorities therein cited). Similarly, findings concurred in by two courts do not control the decision here where "facts and their constitutional significance are too closely connected" and "the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 404. Even where the parties to the litigation have stipulated as to the "facts," this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law. See, *e. g., Swift & Co.* v. *Hocking Valley R. Co.,* 243 U. S. 281.

The prior proceedings between the same parties, as to which we would be blind not to take judicial notice, as well as the unquestioned facts pertaining to the meat industry are relevant to interpret the findings of the Court of Claims. We have concluded that here "replacement cost" is a spurious, *i. e.* non-legal, basis for determining just compensation. It is as though the Court of Claims had based its opinion on a balance sheet and we had to interpret the balance sheet into actualities. And so we hold that, as a matter of law, the court below erred in utilizing replacement cost as the basis for determining what constituted just compensation.

When due regard is given to the findings of the Court of Claims, they fail to establish that the compensation proffered by the Government for the requisitioned pork cuts, based on the maximum ceiling prices, falls short of

"just compensation." We are therefore not called upon to consider whether as a matter of constitutional law prices fixed by the Government for the sale of commodities are the measure of "just compensation" for commodities seized by the Government. As the conflict of opinion here indicates, that is a debatable issue which, since we can, we must avoid adjudicating. See *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 105.

The burden of proving its case was upon the respondent. The nature of this burden was to prove, in light of the governing facts of the industry, that the administrative award for the taking of respondent's property was less than just compensation, based as it was on prices which the Administrator had established for those products and which had been left undisturbed by the process devised by Congress for assuring the fairness of these prices. By evidence merely of bookkeeping losses, respondent did not carry its burden of proving actual damage. Just compensation is a practical conception, a matter of fact and not of fiction. Respondent introduced no evidence, and the Court of Claims made no findings, to establish a loss based on its total operations during the period relevant to the slaughtering of the hogs from which the requisitioned products were processed.[15] On

[15] The court below found that the $25,112.50 award was the equivalent of the ceiling price of the requisitioned property when sold at wholesale in carload quantities at Philadelphia on March 3, 1943, the date the Government took possession and title; that the respondent customarily sold its products at wholesale but in lots of less than 500 pounds each and that it made delivery to its customers by means of 57 route trucks; that the ceiling price if the requisitioned property had been sold in this customary manner would have been $26,362.50; that the difference between the two ceiling price figures resulted from the $1 per cwt. deduction established by the price regulation for sales in carload quantities; and that the "$1.00 differential was intended to partially defray the expense incurred for delivery and sale in less than carload quantities." 67 F. Supp. at 1022. Respondent did not challenge the reasonableness of the $1 differential in

the basis of such figures it would be necessary to determine by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government. In the proceedings below the respondent neither alleged such a loss nor submitted proof in support of it. Since it has not maintained its burden of proving that the ceiling price award entails damages, the judgment of the Court of Claims cannot stand.

The judgment is reversed with directions to the Court of Claims to enter a judgment for the respondent in an amount not exceeding $12,556.25, with interest on the amount of $25,112.50 from March 3, 1943, the date of the requisition, to May 22, 1943, the date of the final award made by the Director of the Food Distribution Administration.

MR. JUSTICE REED, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY join, concurring in the judgment.

I agree with the disposition of this case made by JUSTICE FRANKFURTER'S opinion. However, I cannot concur in the reasoning by which that result is reached. That opinion holds that the respondent is not entitled to recover

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its petition filed with the court below. Respondent argues here, however, that the effect of the differential is to reduce the return it would have netted if it had been allowed to sell the requisitioned products in small quantities. But, bearing in mind that this is a suit for actual damages, the argument has a fatal weakness. If the respondent had sold in smaller quantities at the higher ceiling price and made delivery by truck, it would have incurred all of the expenses that motivated the differential—invoicing, billing, handling, and transportation. None of these expenses was incurred when the Government requisitioned the pork products. The "loss" in the gross sales figures would have been counterbalanced, to some extent at least, by the additional expenditures. Cf. *Superior Packing Co.* v. *Clark*, 164 F. 2d 343, 347–48. All this bears on the guiding consideration that recovery in this action must be related to proof of actual loss.

as "just compensation" anything in addition to the ceiling price unless it can "establish a loss based on its total operations during the period relevant to the slaughtering of the hogs from which the requisitioned products were processed" and "determine by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government." Why a loss on total operations must be established in order to show the loss on the hog products requisitioned by the Government is not clear to me. It is the market value of any product that is the basis for "just compensation." If there is no real market value, cost may be an element in the determination of value. Under the circumstances of this case, any other value than the ceiling price is illusory. Consequently I believe that whenever perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of "just compensation."

Five members of this Court express their agreement that replacement cost, if relevant, has been properly found by the Court of Claims. If replacement cost, determined by any accounting system, is a factor, the evidence on which the Court of Claims based its findings of that cost is not before us, and therefore those findings cannot be properly regarded as unsatisfactory. Even if we assume that the evidence offered did not properly allocate costs, the Government raised no such issue by its petition for certiorari or in its brief. The record does show a finding of replacement cost based upon some evidence. In the absence of that evidence from the record, it must be assumed that it would support the findings. If we assume that replacement cost is relevant, to say that a manufacturer who proves that cost by the results of his own system of cost accounting may not retain his award because a more accurate accounting system exists, though not offered in evidence, disregards the salutary rule that

litigants in civil matters must be allowed to frame their issues and prove their cases in trial courts as each desires. This principle includes the introduction of such relevant evidence as each wishes to introduce. Often proof of value or damages is difficult. Courts then reach conclusions from the relevant evidence presented. *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544; *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251. Findings are properly made on the basis of the relevant evidence heard and are not subject to attack because other available evidence might have been produced. The suggestion of JUSTICE FRANKFURTER'S opinion as to a better method for determining replacement cost is futile, since it furnishes a rule, rejected by the majority of this Court, for the Court of Claims to use in determining just compensation. The approval of the method of determining replacement cost used by the Court of Claims by a majority of this Court logically requires a decision on whether or not the ceiling price represents "just compensation."

It may be assumed that the respondent cannot replace the requisitioned hog products at the ceiling price. If respondent was impelled to replace the requisitioned products in its stock, its reasons for so doing lay in the realm of business judgment. There was no legal compulsion. It acted to keep its line of goods complete, to serve its customers and to preserve its good will. Any additional cost to the respondent caused by replacing the products was a consequential damage for which compensation is not given in federal condemnation proceedings. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 382.

It has been long established that in a free market the market price is the proper criterion for determining "just compensation." *Olson* v. *United States*, 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S.

106, 123. In *Vogelstein & Co.* v. *United States,* 262 U. S. 337, this Court held that the prevailing price in a controlled market was "just compensation." The Vogelstein Company was a wholesaler of refined copper. Between September 28, 1917, and February 1, 1918, the United States requisitioned from the Company 12,542,857 pounds of copper for which it paid 23.5¢ per pound. But this price was not the result of the interplay of supply and demand on a free and open market; it was a price fixed by an agreement made by the War Industries Board with copper producers and approved by the President on September 21, 1917. Vogelstein Company, although not a producer, had apparently cooperated with the producers in the establishment and maintenance of the 23.5¢ price. The Company argued that it was entitled to 26.8¢ per pound—the average cost to it of the copper requisitioned by the United States. This Court concluded that paying the fixed 23.5¢ was correct. "The market price was paid. The market value of the copper taken at the time it was taken measures the owner's compensation." 262 U. S. at 340. Consequently, the judgment of the Court of Claims dismissing the company's petition was affirmed. This acceptance of the fixed price as the market value closely approaches the situation now presented.

It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone [1] and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to

[1] See *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of "just compensation." That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is "just compensation." [2]

If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented. Here we have price regulation of meat products on a national scale with judicial review of those regulations. The Government sought for itself no unique opportunity to purchase.

The respondent, as JUSTICE FRANKFURTER'S opinion points out, filed several protests against the Maximum Price Regulations controlling the ceiling prices of hog products. These protests were rejected by the Administrator and review by the Emergency Court of Appeals was not sought. It was during the course of these proceedings that evidence of the profit and loss of the industry and of the replacement cost of pork products could properly be introduced. However, once the maximum price had been set and had not been set aside by direct attack, that price became the only relevant measure of just compensation. Whether normally admissible or not,[3] the replacement cost of perishable articles then subject to price control, bought to maintain the good will of a business,

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[2] Cf. *Nortz* v. *United States*, 294 U. S. 317, 328–29.

[3] See Orgel, Valuation Under Eminent Domain (1936) 586.

cannot be an element in the determination of value to fix just compensation. Therefore, evidence of replacement cost in condemnation proceedings such as that before the Court today is irrelevant and should not be admitted.

MR. JUSTICE RUTLEDGE, concurring.

Six members of the Court agree that the judgment of the Court of Claims must be reversed, but are equally divided in their groundings. Since I am in partial agreement with both groups, I state my own conclusions independently.

It may be, as my brother REED and those who join with him think, that the ceiling price in a wartime controlled market should furnish the measure of constitutional just compensation for property of a highly perishable nature taken. Perhaps also this view should be qualified further, as by some limitation which would make adjustments beyond that price permissible when the circumstances of the taking are such that they would entail destruction of property values beyond those inherent merely in the property which the Government receives and uses.[1]

But I am also in agreement with my brother FRANKFURTER and those who concur with him that it is not necessary to reach these important constitutional issues in this case. For I think that, with reference to such perishable commodities taken under circumstances like these, the legal market or ceiling price furnishes at least

[1] In some situations the Court has allowed compensation for the destruction of property as being equivalent to "taking" it, cf., *e. g.*, *United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546; *United States* v. *General Motors Corp.*, 323 U. S. 373, 384; in others apparently what amounted in effect to destruction has been regarded as infliction of consequential injuries and thus as not compensable, cf. *e. g.*, *Bothwell* v. *United States*, 254 U. S. 231; *Mitchell* v. *United States*, 267 U. S. 341.

presumptively the measure of just compensation, and that this measure should apply unless and until the owner sustains the burden of proving that he has sustained some loss for which he is entitled to a greater award.

That burden, I also agree, the respondent has not sustained in this case. The Court of Claims awarded respondent its "replacement costs," in the view that "when property is taken the owner must be put in as good position pecuniarily as he was in before his property was taken." [2] Payment of the ceiling price did not do this, since as the court pointed out respondent "felt obliged to furnish its customers a certain amount of products, although at a loss, in order to retain their good will and . . . hold its organization together." [3] For this reason it became necessary for respondent to go into the market and purchase live hogs and process them, paying a higher price than it had paid for the hogs from which the products taken had been processed. In this way respondent incurred a loss it would not have incurred had those products not been taken.

On this basis, I agree with MR. JUSTICE REED that the loss is one for consequential damages. That is, it is one to compensate for loss incurred to preserve unimpaired

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[2] 107 Ct. Cl. 155, 165. For this grounding the court relied upon citation of *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 125; *United States* v. *Miller,* 317 U. S. 369, 374; *Walker & Co.* v. *United States,* 105 Ct. Cl. 553. The quoted statement, of course, taken abstractly, is broad enough to permit the award of consequential damages, an effect contrary to this Court's consistent rulings. See the authorities cited in note 4.

[3] 107 Ct. Cl. 155, 165. The record before us contains no proof that replacing the requisitioned goods was essential to prevent respondent from going out of business or that the loss of good will entailed by the taking, if not repaired by replacement, would have prevented continued employment of respondent's employees or disrupted its organization.

respondent's good will,[4] not to compensate for any value lawfully obtainable for the articles then or prospectively within any reasonable future period, in view of the property's perishable nature, from other sources.

But respondent asserts its claim to "replacement value" on a different theoretical basis, *i. e.*, not as compensation for loss incurred in preserving good will, but as the proper measure of the value of the property when requisitioned. And if market price, here ceiling price, is not the measure of compensation, it is said "replacement cost" furnishes the best substitute or at any rate an appropriate element for consideration.

The difference in the present circumstances would seem to be highly verbal. For in any event the loss was actually incurred for the purpose of keeping respondent's customers satisfied and thus preserving its good will unimpaired; in other words, to prevent the accrual of injury consequential to the taking.

It is true that in circumstances where there is no market value, "replacement cost" has been held appropriate for consideration in reaching a judgment concerning the value which is just compensation. But this seems to me a different thing from allowing such proof, when the loss it reflects has been incurred solely to prevent consequential injury, and there is a market value presumptively valid to compensate for all losses incurred except that loss. To allow that proof in these circumstances would be in substance if not in form to permit an award for elements of consequential damages entirely out of line with the policy of this Court's prior decisions concerning compensation for such injuries.[5]

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[4] See *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378, and authorities cited; cf. *United States* v. *General Motors Corp.*, 323 U. S. 373, 383.

[5] See authorities cited in note 4.

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The considerations set forth by my brother FRANKFURTER respecting the difficulties, indeed the near impossibility, of proving costs in this case would seem to support this conclusion. Accordingly, I concur in the judgment of the Court.

MR. JUSTICE JACKSON, with whom MR. JUSTICE DOUGLAS joins, dissenting.

It would appear that this Court in this case is exceeding the limitation placed by Congress on its review of Court of Claims decisions. 28 U. S. C. § 288; 53 Stat. 752. The Court does not decide, as Congress has authorized it to do, that any finding of the Court of Claims is not supported by substantial evidence, or that the ultimate findings lack support in evidentiary findings, or that there has been a failure to make findings on the material issues. Instead, in effect it sets aside the judgment below on its own interpretation of "recognized facts in the meat industry." Of these it takes judicial notice on the basis of an assortment of publications which, whatever their merits if called to the attention of the court below, should not in this Court outweigh specific findings of fact by the Court of Claims based on evidence before it.

Taking the facts as found by the Court of Claims, the case is this: Claimant was a meat packer and among its products were pork chops. The Government set a maximum price at which pork chops could be sold. It set no maximum price on the two principal factors in the cost of pork chops, *viz:* live hogs and labor. The result was that claimant's uncontrolled costs mounted until, on what is found to be a fair allocation of costs between chops and other products of the hog, it was costing more to produce the pork chops than the price for which claimant was permitted to sell them. But there were certain collateral benefits derived from supplying old patrons, even at a loss, to avoid heavier losses from shutting down

the business and to keep customer good will for the hoped-for day of normal business.

However, the Government decided to buy claimant's chops. It offered the maximum OPA price. As there was no such compensating advantage to the packer in selling its choice cuts to the Government at a loss, as in keeping its business going with its general customers, it refused the offer. The Government then seized its pork chops and the company now claims the "just compensation" which the Constitution guarantees to those whose private property is taken for public use. The Government contends, and the practical effect of the Court's holding is, that the company can recover only the maximum price fixed for its products by the Office of Price Administration, in spite of the finding that this is less than it cost to produce or to replace them.

It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Government itself, for the long-range success of price controls, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries,* 262 U. S. 341, 343; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for pub-

lic use becomes meaningless if the Government may first, under its "war powers," fix the market price and then make its controlled figure the measure of compensation.[1]

It must be remembered that market price, as such, is not controlling. The Fifth Amendment's "exact limitation on the power of the government" [2] is not market price—it is just compensation. The former is relevant, and this Court has so considered it, only because, in a free market, it is perhaps the best key to value at the time of taking. Original cost and replacement cost yield to it only because of that factor. But here, there is no true market price [3] to provide the usually accepted standard of value. The relevance of original cost and replacement cost, even in this situation, cannot seriously be denied. In the absence of an over-riding free-market

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[1] Such a rule hardly squares with the doctrine laid down by this Court more than fifty years ago that "the compensation must be a full and perfect equivalent for the property taken," *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 326, or later expressions that "the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken," *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 304; *Olson* v. *United States*, 292 U. S. 246; *United States* v. *Miller*, 317 U. S. 369.

[2] ". . . in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325.

[3] The price approved as just compensation in *Vogelstein & Co.* v. *United States*, 262 U. S. 337, was fixed by agreement between the Government and the producers, represented by a committee whose members Vogelstein had nominated, and helped to elect, to represent the industry. Thus that price is not comparable to the Government-dictated price involved in this case. In the *Vogelstein* case, this Court said: "Appellant's contention that there was no market price other than that fixed by the fiat of the United States is without support. . . ." 262 U. S. 339. And, further, "The finding of the Court of Claims is plain and cannot be read as referring to a mere fiat price." 262 U. S. 340.

price, the courts must turn to the soundest standards otherwise available.

We think the Court of Claims made no error of law in thinking that the controlled market price for voluntary sales was not the measure of just compensation for the seized pork chops. Limiting our review to the scope which Congress has authorized, we find no error in its calculation of just compensation for the purposes of complying with the constitutional requirements.

CENTRAL GREYHOUND LINES, INC. *v.* MEALEY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 14. Argued October 13, 1947.—Decided June 14, 1948.

1. The validity of a state tax under the Federal Constitution was challenged before the State Tax Commission of New York and on review before the Appellate Division of the Supreme Court. Notwithstanding a claim that the only question presented was one of statutory construction, the Court of Appeals of New York expressly sustained the constitutionality of the tax and certified in its remittitur that it had done so. On appeal to this Court, *held:* The constitutional question is properly before this Court for review. Pp. 654–655.
2. A common carrier by motor vehicle challenged the validity under the Federal Constitution of a New York tax on its gross receipts from transportation of passengers between two points in the State but over a route 42.53% of which was in New Jersey and Pennsylvania. *Held:* New York may constitutionally tax gross receipts from the transportation apportioned as to the mileage within the State; but the tax on gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce, in violation of the commerce clause of the Constitution. Pp. 655–664.

296 N. Y. 18, 68 N. E. 2d 855, reversed.

The constitutionality of a tax levied by New York on gross receipts of a common carrier from transportation

between two points in New York, but largely through New Jersey and Pennsylvania, was sustained by the State Tax Commission, the Appellate Division of the Supreme Court of New York (266 App. Div. 648, 44 N. Y. S. 2d 652), and the Court of Appeals of New York (296 N. Y. 18, 68 N. E. 2d 855). On appeal to this Court, *reversed and remanded,* p. 664.

Tracy H. Ferguson argued the cause for appellant. With him on the brief were *George H. Bond* and *Edward Schoeneck.*

John C. Crary, Jr., Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *Irving I. Waxman,* Assistant Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding arising out of a determination by the Tax Commission of the State of New York, sustained by the courts of the State, whereby § 186–a of the New York Tax Law was construed to impose a tax on appellant's gross receipts from transportation between points within the State but over routes that utilize the highways of Pennsylvania and New Jersey. The appellant contends, against contrary conclusions below, that since the taxed transportation was interstate commerce, New York may not constitutionally tax the gross receipts from such transportation. In any event, it submits that the State may validly tax only so much of these gross receipts as are attributable to the mileage within the State. Before dealing with these issues, we must dispose of an objection to our right to deal with them.

The State urges that the constitutional claims here pressed by the appellant were not passed upon by the New York Court of Appeals. The record does not sustain this challenge to our jurisdiction. The constitutional issues were undeniably raised before the State Tax Commission and on review before the Appellate Division of the Supreme Court, 266 App. Div. 648. The suggestion that these issues were not before the Court of Appeals is based on its statement that the question urged there was "not one of constitutional taxing power but of statutory construction." 296 N. Y. 18, 24. But the court proceeded to pass upon the constitutional issues and expressly held that "there is no constitutional objection to taxation of the total receipts here. This is not interstate commerce . . . ." 296 N. Y. at 25. Its amended remittitur stated explicitly that a question arising under the Commerce Clause of the Constitution "was presented and passed upon," and that in sustaining the tax the court "held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution." This amendment was not a retrospective injection of a non-existent federal question, but a formal certification that a federal claim had been presented and was adjudicated by the Court of Appeals. It is properly here for review. § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

This case serves to remind once more that courts do not adjudicate abstractions, such as, "What is interstate commerce?" Also, it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause.

It is too late in the day to deny that transportation which leaves a State and enters another State is "Com-

merce . . . among the several States" simply because the points from and to are in the same State. *Hanley* v. *Kansas City Southern R. Co.*, 187 U. S. 617; *Western Union Tel. Co.* v. *Speight*, 254 U. S. 17; *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404. In reaching the opposite conclusion the State court relied upon three decisions of this Court: *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *Leavenworth*, 226 U. S. 464; *New York ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. The *Ewing* case was based on the *Lehigh Valley* case; the *Cornell Steamboat* case relied on the *Ewing* and the *Lehigh Valley* decisions. The holding in the *Lehigh Valley* case was defined with precision by Mr. Justice Holmes in the *Hanley* case. He accounted for some State decisions which disregarded interstate commerce as a matter of fact, tested by the actual transaction, as "made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far." He pointed out that in the *Lehigh Valley* case "the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate." *Hanley* v. *Kansas City Southern R. Co.*, *supra*, at 621. This limited scope of the *Lehigh Valley* case was the basis of decision in *United States Express Company* v. *Minnesota*, 223 U. S. 335. In that case, the Minnesota Supreme Court had interpreted the *Lehigh Valley* decision "as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent. of the taxes recovered on this class of earnings should be deducted from the amount

of the recovery." 114 Minn. 346, 350. On writ of error to the Supreme Court of Minnesota, this Court upheld the State court's application of the *Lehigh Valley* decision. 223 U. S. 335, 341–42.

In view, however, of some contrariety of views to which the opinion in the *Lehigh Valley* case has given rise, it calls for a more candid consideration than merely quoting phrases from it congenial to a particular decision. The *Lehigh Valley* case was this. The Lehigh Valley Railroad Company attacked the validity of a Pennsylvania statute taxing the company's gross receipts from its line between Mauch Chunk, Pennsylvania, and Phillipsburg, New Jersey. The Pennsylvania Railroad operated a connecting line between Phillipsburg and Philadelphia. The Lehigh and the Pennsylvania had arranged for continuous transportation of through passengers and freight between Mauch Chunk and Philadelphia. The trial court had found, as appears from the record, that the "total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried." It sustained the tax on the ground that the transportation was in substance "purely internal." The Supreme Court of Pennsylvania affirmed on the trial court's opinion. *Lehigh Valley R. Co.* v. *Commonwealth,* 1 Monag. 45, 17 Atl. 179.

When the case got here, the Lehigh Valley contended that the transportation between Mauch Chunk and Phillipsburg constituted interstate commerce and therefore beyond the taxing power of Pennsylvania, because Phillipsburg, while on the Delaware River border between

Pennsylvania and New Jersey, was in New Jersey and reached by the railroad via an interstate bridge. Pennsylvania, on the other hand, ignoring the stretch over the interstate bridge (apparently on the theory of *de minimis*) insisted that the gross receipts were deemed to be "wholly from traffic within the state" because so treated by the railroad itself. This was based on the fact that the Lehigh Valley and the Pennsylvania Railroad had apportioned the receipts from their through traffic, and the amount of the gross receipts which Pennsylvania taxed was the proportion which the railroads *inter se* attributed to the Lehigh Valley as its share of the earnings within Pennsylvania. This fiscal arrangement between the two railroads is the explanation and justification for the statement in this Court's opinion that "The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State." 145 U. S. at 201. And so, naturally enough, in the *Hanley* case the Court called the tax which had been sustained in the *Lehigh Valley* case "a proportioned tax," and as such it "had been sustained in the case of commerce admitted to be interstate." *Hanley* v. *Kansas City Southern R. Co., supra,* at 621.

In support of the proposition that "a proportioned tax had been sustained in the case of commerce admitted to be interstate" the *Hanley* case invoked *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217. Unfortunately, the opinion in *Lehigh Valley* did not rely on that case. It did not even mention it. This silence is explicable by the fact that only a few months before, in the same term, the Court had sharply divided on this very issue in the *Grand Trunk* case. In the *Lehigh Valley* case Mr. Chief Justice Fuller spoke for a unanimous court. One is entitled to infer that such accord was obtainable by not renewing the battle of the *Grand Trunk* case. It would not be

the first time in the history of this Court that agreement could be reached by one mode of reasoning but not by another. Mr. Justice Bradley and his fellow dissenters in the *Grand Trunk* case were evidently content to sustain the Pennsylvania tax as a tax on "domestic transportation," "internal intercourse," in short as not "interstate commerce," for thereby they would not bring into question the views so vigorously expressed by them a few months before.

It was reasonable enough to disregard the short distance in which the transportation in the *Lehigh Valley* case went over the interstate bridge on the Delaware River but otherwise was wholly in Pennsylvania, and to treat it as *de minimis* when the railroad's accounting itself treated the receipts as proportioned. "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." *Galveston, Harrisburg and San Antonio R. Co.* v. *Texas,* 210 U. S. 217, 225. But to label transportation across an interstate stream "local commerce" for some purposes when it is "interstate commerce" in other relations, see, *e. g., Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, is to use loosely terms having connotations of constitutional significance. To call commerce in fact interstate "local commerce" because under a given set of circumstances, as in the *Lehigh Valley* case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction. Especially in the disposition of constitutional issues are legal fictions hazardous, because of the risk of confounding users and not merely readers. The kind of confusion to which the *Lehigh Valley* opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a manner of stating that a particular exercise of State power is not

invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it.

This brings us to the facts of the case before us. New York claims the right to tax the gross receipts from transportation which traverses New Jersey and Pennsylvania as well as New York. To say that this commerce is confined to New York is to indulge in pure fiction. To do so, does not eliminate the relation of Pennsylvania and New Jersey to the transactions nor eliminate the benefits which those two States confer upon the portions of the transportation within their borders. Neither their interests nor their responsibilities are evaporated by the verbal device of attributing the entire transportation to New York. There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, *e. g.*, *Eichholz* v. *Public Service Commission of Missouri,* 306 U. S. 268, and *Ryan* v. *Pennsylvania Public Utility Commission,* 143 Pa. Super. 517. We are not dealing with a necessary deviation or a calculated detour. Nor is New York seeking to tax transactions physically outside its borders but so trifling in quantity to the New York commerce, of which they form a part, as to be constitutionally insignificant. New York seeks to tax the total receipts from transportation of which nearly 43% of the mileage lay in New Jersey and Pennsylvania. Transactions which to such a substantial extent actually take place in New Jersey and Pennsylvania cannot be deemed legally to take place in New York.

Of course we are dealing here with "interstate commerce." Of course Congress did not exceed its power to regulate such commerce when in the Motor Carrier Act of 1935 it explicitly included commerce such as that before us within the scope of that Act: "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." 49 Stat. 543, 544, 49 U. S. C. § 303 (a) (10). In a case like this nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation. See *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, and *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. Such being the real issue inevitably "nice distinctions are to be expected." *Galveston, Harrisburg and San Antonio R. Co.* v. *Texas, supra,* at 225. But such distinctions would be clearer and more reasonably made if, for instance, a flat privilege tax applied by a municipality to an express company shipping packages between points within a State, but over routes which for a very short distance pass out of the State, had been frankly sustained on the ground that the tax did not burden interstate commerce in the constitutional sense rather than on the ground that it was not interstate commerce. Compare *Ewing* v. *Leavenworth, supra,* with *Kirmeyer* v. *Kansas,* 236 U. S. 568. Again, it would have made for a less dialectical, if not more coherent, development of the law to sustain a New York gross receipts tax on a New York corporation, engaged in towing vessels between ports in

the State of New York on the Hudson River traversing the New Jersey side but not touching its shore, on the ground that upon the facts of that case, and more particularly New Jersey's relation to the transactions (very different from those now before us), New York was not burdening interstate commerce, rather than to hold that "transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State." Compare *New York ex rel. Cornell Steamboat Co.* v. *Sohmer, supra,* at 560, with *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634.

It is significant that, so far as we are advised, no State other than New York seeks to tax the unapportioned receipts from transportation going through more than one State, (except to an extent so insignificant as to be disregarded), merely because such transportation returns to the State of its origin. If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which they afford protection, we do not see how on principle and in precedent such a claim could be denied. This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give protection to those portions, as well as to a State which does not. This is not to conjure up remote possibilities. Pennsylvania's claim to tax a portion of appellant's gross receipts from the transportation which New York has taxed is not a matter of speculation. Apparently, Pennsylvania has so taxed since 1931. Penn. Laws 1931, No. 255, as amended by Act of June 5, 1947,

No. 204. New York does not deny that Pennsylvania in fact so taxes, though there is dispute as to the meaning of the formula by which she does so. But even if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the taxing by New York of the entire revenue. *Freeman* v. *Hewit,* 329 U. S. 249, 256. By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than "a fair share of the cost of the local government whose protection it enjoys." *Id.* at 253. The vice of such a tax is that it lays "a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions." *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 297; see *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, 311; *Freeman* v. *Hewit, supra; Joseph* v. *Carter and Weekes Stevedoring Co.,* 330 U. S. 422.

However, while the New York courts have construed the statute as levying an unapportioned gross receipts tax on this transaction, the entire tax need not fall. The tax may be "fairly apportioned" to the "business done within the state by a fair method of apportionment." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255. There is no dispute as to feasibility in apportioning this tax. On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State. See *Ratterman* v. *Western Union Telegraph Co.,* 127 U. S. 411, 427–28. There is no question as to the fairness of the suggested method of apportionment. Compare *Maine* v. *Grand Trunk R. Co., supra,* with *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments,* 280 U. S. 338; cf. *Wallace* v. *Hines,* 253 U. S. 66. Both appellant and appellee have indicated here

that, as a matter of construction, the statute under consideration permits such apportionment, but that is a matter for the New York courts to determine.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE MURPHY, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, dissenting.

A precise delineation of the controlling facts is essential to a determination of the constitutional issue involved in this appeal. That issue concerns an alleged conflict between the commerce clause of the Constitution of the United States and a New York statute taxing the gross income of utilities doing business within that state. Specifically, the problem relates to an application of the tax to the gross receipts from bus transportation originating and terminating in New York but passing through parts of New Jersey and Pennsylvania.

Section 186–a of the New York Tax Law is entitled "Emergency tax on the furnishing of utility services." It imposes a tax "equal to two per centum of its gross income . . . upon every utility doing business in this state . . . in addition to any and all other taxes and fees imposed by any other provision of law for the same period." [1] The word "utility" is defined to include every person "subject to the supervision of either division of the state department of public service" [2] and the words "gross income" are defined to include "receipts received in or by reason of any sale . . . made or service rendered for ultimate consumption or use by the purchaser in this state . . . ." [3]

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[1] New York Tax Law, § 186–a, subd. 1.

[2] New York Tax Law, § 186–a, subd. 2 (a).

[3] New York Tax Law, § 186–a, subd. 2 (c).

Appellant is a New York corporation engaged in business as a common carrier by omnibus. It operates its buses both within and without New York and is subject to the supervision of the New York Public Service Commission. Hence it is a utility within the meaning of § 186–a.

Appellant operates buses over numerous routes from New York City to Buffalo and other cities in upstate New York, routes which cut across sections of New Jersey and Pennsylvania and which are the most direct ones possible. The controversy is concerned only with the taxation under § 186–a of that part of appellant's receipts derived from continuous transportation of passengers between New York points over such routes. Application of the tax to the receipts from transportation moving solely within New York is not contested; and receipts from transportation between New York points and out-of-state points have not been taxed.

At the hearing before the State Tax Commission relative to the contested tax, the parties agreed that the evidence would be limited to the operations over these routes during July, 1937, and that the conclusions to be drawn from such evidence would be applicable to all months subsequent thereto. The evidence which was introduced revealed that 57.47% of the total mileage of the journeys over the routes in question was traversed within New York, while 42.53% thereof was traversed within New Jersey and Pennsylvania. Although some transfers and stopovers in New Jersey and Pennsylvania were indicated, there was no showing that they were of a substantial number or that they were of such a nature as to break the transportation between New York points into two unrelated trips. The legal issues in the case have been predicated at all times upon the evidence that there was continuous transportation of passengers between New York points on single tickets and upon the evidence

as to the percentage of the mileage traversed within and without New York.

The State Tax Commission construed § 186–a as applicable to appellant's total receipts from the transportation in issue, proration of the receipts in accordance with the mileage traversed in New York being considered unnecessary. So construed, § 186–a was held not to conflict with the commerce clause of the Federal Constitution. This ruling was sustained by the New York courts.

The crucial fact, from the constitutional standpoint, is the dual and unique character of transportation between termini in the same state where the territory of another state is traversed en route. Such transportation has both interstate and intrastate features. From the standpoint of physical movement, there is a crossing of state lines and a journey over territory belonging to more states than one—a movement that is undeniably interstate. At the same time, however, the business of transporting passengers or freight between points in the same state is essentially local in character despite the interstate movement. All of the essential elements of the commercial intercourse represented by the continuous transportation are resident in that one state. The parties to the transportation contract, the making of the contract and the service which is the subject of the contract are identified preeminently with that state. The whole purpose of the transaction is to transport the passengers or freight to a point within the same state as the point of origin. Passage through another state is a mere geographic incident in the consummation of this local transaction. While that passage may have interstate significance for other purposes, it cannot operate by itself to make interstate the commercial relationship underlying the continuous transportation.

And so within the narrow compass of this particular type of transportation it is something more than a fiction

to say that both interstate and intrastate features are present. Cf. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. It is a recognition of the hard realities of the situation. It is a realization that transporting persons between points in the same state is a business local in all its commercial connotations, even though there is a physical movement of an interstate character. Due respect for Mr. Justice Holmes' admonition that commerce among the states is a practical rather than a technical legal conception, *Swift & Co.* v. *United States,* 196 U. S. 375, 398, forbids an indiscriminate application of the interstate label simply because state lines are crossed in the course of a particular business. Where local elements remain intact despite the interstate movement it is of the essence of practicality to give recognition to that fact. Such is the situation in this case.

This Court has long recognized that this type of transportation, unlike other types, is physically interstate and commercially local. And it has given life to that distinction so that the federal power over interstate commerce might remain effective without detracting unnecessarily from the scope of state power over those engaged in this narrow transportation sphere. Where the proposed state action is such as to create an actual or potential conflict with the federal authority arising out of the physical movement across state lines, the Court has emphasized the interstate aspect of the transportation in making the federal power supreme. Thus in *Hanley* v. *Kansas City Southern R. Co.,* 187 U. S. 617, Congress was found to have the sole power to fix the rates for transportation of freight by rail between two points in Arkansas over a route passing through a part of the Indian Territory; Arkansas was accordingly precluded from the exercise of its rate-making authority in this instance. Such transportation was said to be interstate, stress being laid upon the physical movement of the freight across and beyond the Arkansas border.

See also *Missouri Pacific R. Co.* v. *Stroud,* 267 U. S. 404; *Western Union Tel. Co.* v. *Speight,* 254 U. S. 17; compare *Wilmington Transportation Co.* v. *Railroad Commission,* 236 U. S. 151.

But where the impact of state action is such as not to endanger or embarrass federal control over interstate movements, the Court has relied upon the local elements of the transportation in sanctioning the imposition of state authority. This has occurred in the setting of state gross receipts taxes and city license taxes levied on those engaged in the type of transportation here involved. *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192; *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Ewing* v. *Leavenworth,* 226 U. S. 464; *Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549. In those cases the taxes were non-discriminatory in nature and interfered in no way with any regulations Congress might wish to impose by reason of the movements across state lines. The thrust of the taxes affected only the business of transporting articles between two points in the same state and the receipts derived therefrom. That business was considered to be of a local variety and a clear rejection was made of the contention that "the mere passage over the soil of another State renders that business foreign, which is domestic." *Lehigh Valley R. Co.* v. *Pennsylvania, supra,* 202. As stated in *Cornell Steamboat Co.* v. *Sohmer, supra,* 560, "But transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State."

Room has thus been made in our federal system for a reasonable accommodation of the federal and state interests in regulating and taxing those engaged in this unique transportation. See *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 639, note 4. It is an accommodation

designed to protect the national interest in uniform regulation of interstate movements as well as to safeguard the states' legitimate interest in placing a fair share of the local burdens on those doing local business.[4]

The proper answer to the issue in this case is dictated in large part by the *Lehigh Valley* line of decisions. Those prior cases are not to be dismissed as dialectical exercises in the law of interstate commerce. They represent a realistic appreciation of the fact that the business from which the gross receipts in issue were derived is local in nature. And § 186–a of the New York Tax Law, in taxing those gross receipts, is consistent with the commerce clause of the Federal Constitution. This tax is grounded on a base different from that which justifies the exercise of federal power, making a conflict between federal and state authority impossible. In effect, § 186–a levies a non-discriminatory tax on all companies furnishing continuous transportation service between cities in that state. The tax is in terms of a percentage of the gross receipts from that service. Engaging in such transportation service is a local business, even though some of the routes cross parts of other states. And taxing the gross receipts from this service is well within

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[4] Section 303 (10) of Part II of the Interstate Commerce Act, 49 U. S. C. § 303 (10), defines interstate commerce, for federal regulatory purposes, to include commerce "between places in the same State through another State." But § 302 (b) of the same Act, 49 U. S. C. § 302 (b), states that nothing therein "shall be construed to affect the powers of taxation of the several States." This is a Congressional recognition of the accommodation that exists in regard to the federal and state interests.

See, in general, Kauper, "State Regulation of Interstate Motor Carriers," 31 Mich. L. Rev. 1097, 1105–1107; Tarnay, "Methods for Differentiating Interstate Transportation from Intrastate Transportation," 6 Geo. Wash. L. Rev. 553, 633–637; Ganit, The Commerce Clause of the United States Constitution, § 62 (d), (1932).

the constitutional power of New York so far as the commerce clause is concerned.[5]

In light of the past decisions of this Court, the only novel question here presented is whether New York must limit its tax to that proportion of the receipts which corresponds to the proportion of the mileage traversed within that state on the trips in issue, *i. e.* 57.47%. *Lehigh Valley R. Co.* v. *Pennsylvania, supra,* and *United States Express Co.* v. *Minnesota, supra,* did not involve this question since the gross receipts taxes had there been prorated by the respective states before reaching this Court, and *Ewing* v. *Leavenworth, supra,* was concerned only with a flat license tax. While *Cornell Steamboat Co.* v. *Sohmer, supra,* did involve an unapportioned gross receipts tax, the facts were such as to make it impossible to determine what proportion of the journeys took place outside New York; the precise issue was thus unresolved.

The rule requiring apportionment of gross receipts taxes to the activities carried on within a state is one that is necessarily predicated upon the existence of some interstate activities which the commerce clause places beyond the taxing power of the state. See *Ratterman* v. *Western Union Tel. Co.,* 127 U. S. 411; *Wisconsin & M. R. Co.* v. *Powers,* 191 U. S. 379. It is designed to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce. But

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[5] The proper result in this case is aptly paraphrased in *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192, 201–202: "So as to the traffic of the Erie Railway between the cities of New York and Buffalo, we do not understand that that company escapes taxation in respect of that part of its business because some miles of its road are in Pennsylvania, while the New York Central is taxed as to its business between the same places, because its rails are wholly within the State of New York."

this rule obviously is inapplicable where the tax is not levied on what is appropriately labelled interstate commerce. And as we have seen, New York here has levied a tax solely upon the local business of transporting passengers between points in that state, which constitutes the furnishing of utilities within the meaning of the New York Tax Law. The fact that 42.53% of the transportation occurs outside New York does not make that business any less local. From the commercial standpoint, the out-of-state segment of the journey retains its position as an integral part of the continuous local transaction. The proportion of the transportation actually taking place within or without New York thus has no commerce clause significance under these circumstances. Inasmuch as the restrictive force of the commerce clause is non-effective, New York is entitled to tax the total gross receipts from this local commerce.

This result does not permit other states, within the framework of the commerce clause, to tax the local business of transporting passengers between New York points. What is local business as to New York is not local business as to New Jersey or Pennsylvania. The elements which justify New York's unapportioned tax exist only in that state. If New Jersey or Pennsylvania were to tax a portion of appellant's gross receipts from the transportation in issue, such tax would involve quite different constitutional considerations than those which sustain the New York tax. Since New Jersey and Pennsylvania would have an interest in the situation because of the physical movements occurring within their borders, concentration would have to be placed upon the interstate aspect of the transportation. The problem would then be whether these states could constitutionally tax the portion of the gross receipts derived from the mileage traversed therein. If such taxes were sustained, the resulting multiple burden on the gross receipts would sim-

ply be a natural consequence of conducting a local business in such a manner as to use the facilities of more states than one. But that type of multiple burden is not outlawed by the commerce clause. Nor does the possibility of such a burden make the business of transporting persons between points in New York any less local in nature.

I would therefore affirm the judgment below.

WADE *v.* MAYO, STATE PRISON CUSTODIAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 40. Submitted October 13, 1947.—Resubmitted March 9, 1948.—Decided June 14, 1948.

1. Imprisoned under a Florida state court conviction of a non-capital offense, petitioner sought release by habeas corpus in a state court, claiming denial of his federal constitutional right to counsel. An appeal from a judgment denying relief was dismissed by the state supreme court on the merits. At the time of the state supreme court's action, its judgment apparently could have rested on an adequate non-federal ground, but in a later case the court made clear that it had decided the federal constitutional question. *Held:* Although petitioner did not seek certiorari from this Court to review the judgment of the state supreme court, it was within the discretion of the federal district court to entertain an application by petitioner for a writ of habeas corpus and to proceed to a determination of petitioner's federal constitutional claim. Pp. 674–682.

(a) The failure of petitioner to appeal from the judgment of conviction does not bar relief, since it appears that a defendant who is denied counsel in a non-capital case in Florida may raise the constitutional question either by appeal from the conviction or by habeas corpus, and pursuit of one of the two alternative remedies satisfies the requirement of exhaustion of state remedies. Pp. 677–678.

(b) This Court accepts the pronouncement by the state supreme court in a later case that its decision in petitioner's habeas corpus

proceeding rested on the merits of the constitutional question, and not on a ruling that a direct appeal was the only way to raise the issue. Pp. 678–679.

(c) The reasons for the rule requiring exhaustion of the state remedy cease when the highest state court has rendered a decision on the merits of the federal constitutional claim; the problem then is the nature and extent of the federal review of the constitutional issue. Pp. 679–680.

(d) The fact that a state prisoner did not seek review by this Court of a judgment of the highest state court denying his claim of federal right may be a relevant consideration for the district court in determining whether to entertain a subsequent habeas corpus petition, but it does not absolutely bar exercise of the district court's discretion to entertain such a petition. P. 680.

(e) Where it is apparent or even possible that a state prisoner's petition to this Court for certiorari to review a ruling by the highest state court on his claim of federal right would be denied because the judgment appears to be based on an adequate non-federal ground, failure to file the petition should not prejudice the right to file a habeas corpus application in a federal district court. Pp. 680–681.

(f) The flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ. P. 681.

(g) Where the matter is otherwise within the jurisdiction of the district court, it is within the discretion of that court to weigh the failure to seek certiorari against the miscarriage of justice that might result from a failure to grant relief. P. 681.

(h) The fear that the exercise of the district court's power to entertain habeas corpus petitions in such circumstances as these might give rise to frequent instances of a single federal judge upsetting the judgment of a state court, often the highest court of the state, is without foundation. Pp. 681–682.

2. At the commencement of his trial in a Florida state court for the non-capital offense of breaking and entering, petitioner, claiming to be without funds, requested the trial judge to appoint counsel to represent him. The request was refused, the trial proceeded, and petitioner was convicted and sentenced to imprisonment for five years. Petitioner, after exhausting his state remedy, applied to the federal district court for habeas corpus, claiming denial of his federal constitutional right to counsel. The district court found that, at the time of the trial in the state court, petitioner was an

inexperienced youth unfamiliar with court procedure and not capable of adequately representing himself. The district court concluded that the refusal of petitioner's request that counsel be appointed for him constituted a denial of due process, contrary to the Fourteenth Amendment of the Federal Constitution. *Held:* The findings and conclusion of the district court were not clearly erroneous, and it was error for the Circuit Court of Appeals to reverse the district court's judgment. Pp. 682–684.

(a) Refusal to appoint counsel for a defendant in a criminal case who, by reason of age, ignorance or mental capacity, is incapable of adequately representing himself, though the prosecution be of a relatively simple nature, is a denial of due process of law under the Fourteenth Amendment. P. 684.

(b) Whether the failure to appoint counsel in a non-capital case in a state court constitutes a denial of due process under the Fourteenth Amendment does not depend upon whether the law of the state requires such an appointment. P. 684.

158 F. 2d 614, reversed.

In a habeas corpus proceeding in which petitioner sought release from imprisonment under a state court judgment of conviction, the federal district court granted relief on the ground that a federal constitutional right had been denied petitioner at his trial in the state court. The Circuit Court of Appeals reversed. 158 F. 2d 614. This Court granted certiorari. 331 U. S. 801. *Reversed,* p. 684.

E. M. Baynes submitted on briefs for petitioner.

J. Tom Watson, Attorney General of Florida, and *Sumter Leitner,* Assistant Attorney General, submitted on briefs for respondent.

Mr. Justice Murphy delivered the opinion of the Court.

This case centers on two issues: (1) whether it was proper for a federal district court to entertain a *habeas corpus* petition filed by a state prisoner who, having secured a ruling from the highest state court on his fed-

eral constitutional claim, had failed to seek a writ of certiorari in this Court; (2) whether the federal district court correctly held that the prisoner had been deprived of his constitutional right to counsel at the trial for a non-capital state offense.

On February 19, 1945, petitioner Wade was arrested in Palm Beach County, Florida, upon the charge of breaking and entering. He was held in jail until brought to trial before a jury on March 14, 1945, in the Criminal Court of Record of Palm Beach County. Just before the trial started, he asked the trial judge to appoint counsel to represent him, claiming that it was financially impossible to employ one himself. The judge refused the request and the trial proceeded. The jury returned a verdict of guilty on the same day and Wade was immediately sentenced to serve five years in the state penitentiary.

Wade then obtained the aid of counsel. On March 16, two days after the trial and conviction, this counsel filed a petition for a writ of *habeas corpus* in the Circuit Court of Palm Beach County. The petition claimed that the refusal of the judge to appoint counsel for Wade at the trial was a denial of the due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The writ was issued, a hearing was had, and the Circuit Court thereupon granted the motion of the state's attorney to quash the writ. This action was taken on the authority of two decisions of the Supreme Court of Florida holding that under Florida law a trial court has no duty to appoint counsel to represent the accused in a non-capital case. *Watson* v. *State,* 142 Fla. 218, 194 So. 640; *Johnson* v. *State,* 148 Fla. 510, 4 So. 2d 671.

Wade's counsel appealed the decision of the Circuit Court to the Supreme Court of Florida. In the latter court, the state's Attorney General filed a motion to dis-

miss the appeal as frivolous. Two points were emphasized in this motion: (1) Wade had not appealed from his conviction or even filed a motion for a new trial; (2) the Circuit Court had quashed the *habeas corpus* writ on the authority of the two cases cited in its order. The Supreme Court, upon consideration of this motion, granted the motion and dismissed the appeal. No written opinion was filed and no indication was given whether the appeal was dismissed for one or both of the reasons advanced by the Attorney General. The date of this action was May 14, 1945. No attempt was made to secure a writ of certiorari from this Court.

Nearly a year later, on May 8, 1946, a petition for a writ of *habeas corpus* was filed in the United States District Court for the Southern District of Florida. This petition alleged that the refusal to appoint counsel for Wade at the trial deprived him of his constitutional right to due process of law. And the petition further stated that this point had not been raised by way of appeal from the conviction because of the belief that the *Watson* and *Johnson* cases made it plain that the Supreme Court of Florida "has no power of reversal of a conviction because defendants were not represented by counsel, and for that reason failed to obtain a fair trial, except in capital cases, and this case is not a capital case." Such was the reason given for the belief that an appeal would have been useless and of no avail. But the petition pointed out that in order to exhaust all his remedies in the state courts before applying to a federal court, Wade had pursued a writ of *habeas corpus* all the way through the Florida courts.

The District Court granted the writ and a hearing was held on May 17, 1946. Both Wade and the trial judge testified as to the events surrounding the refusal to appoint counsel. After hearing this testimony and the argument of counsel, the District Court concluded that

under the circumstances the denial of Wade's request was contrary to the due process guaranteed by the Fourteenth Amendment, thereby rendering void the judgment and commitment under which Wade was held. But the Fifth Circuit Court of Appeals reversed, holding that the Fourteenth Amendment did not require the appointment of counsel in non-capital state cases unless the state law so required. 158 F. 2d 614.

We then granted certiorari. After the case had been submitted to us on briefs, we ordered the case restored to the docket for reargument on two points: "(1) the propriety of the exercise of jurisdiction by the District Court in this case when it appears of record, in the state's motion for dismissal of the appeal on *habeas corpus,* that petitioner had not availed himself of the remedy of appeal from his conviction, apparently open after trial though now barred by limitation . . . (2) whether the failure of Florida to make this objection in this proceeding affects the above problem."

In our view, it was proper for the District Court to entertain Wade's petition for a writ of *habeas corpus* and to proceed to a determination of the merits of Wade's constitutional claim. The crucial point is that Wade has exhausted one of the two alternative routes open in the Florida courts for securing an answer to his constitutional objection. It now appears that a defendant who is denied counsel in a non-capital case in Florida may attack the constitutionality of such treatment either by the direct method of an appeal from the conviction or by the collateral method of *habeas corpus.* Since Wade chose the latter alternative and pursued it through to the Supreme Court of Florida, he has done all that could be done to secure a determination of his claim by the Florida courts. The fact that he might have appealed his conviction and made the same claim and received the same answer does not detract from the completeness with which

Florida has disposed of his claim on *habeas corpus*. The exhaustion of but one of several available alternatives is all that is necessary.

At the time the Supreme Court of Florida dismissed Wade's *habeas corpus* appeal, however, the propriety of the *habeas corpus* method of raising the right of counsel issue was anything but clear. The failure of that court to specify the reason for the dismissal made it possible to construe the action as a holding that a direct appeal from the conviction was the only remedy available to Wade. The Attorney General's motion to dismiss the *habeas corpus* appeal seemed to make that point and the Supreme Court might have adopted it as the sole ground of dismissal. Had that been the situation, the case before us would be in an entirely different posture. Wade would then be in the position of seeking relief in a federal court after having chosen to forego the opportunity to secure recognition of his claim by the exclusive mode designated by Florida.

But the doubts as to the availability of *habeas corpus* in Florida for the purpose at hand have been dispelled by the subsequent decision of the Supreme Court of Florida in *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585. That case was a *habeas corpus* proceeding in which the Florida court proceeded to pass upon the merits of a claim identical with that raised by Wade. In so doing, the court relied upon the disposition of Wade's *habeas corpus* appeal, stating that it had been dismissed as frivolous. As the *Johnson* case makes clear, Wade's appeal was considered frivolous because the right to counsel in a non-capital case is counter to the settled law of Florida. Reference was made in the *Johnson* decision to the contrary decisions in other states and to "the rule in the Federal Courts but we are of the view that those decisions do not control in Florida." 158 Fla. at 266, 28 So. 2d at 586.

Thus the Supreme Court of Florida announced unambiguously less than a year and a half after its dismissal of Wade's appeal that its action had been grounded on the merits of the constitutional issue tendered by Wade, rather than on a holding that a direct appeal was the only way to raise that issue. It is not for us to contradict this construction by the Florida court and to attribute the dismissal of Wade's appeal to a state ground of procedure which is negatived by both the decision and the reasoning in the later *Johnson* case.

The only real problem in this case concerning the propriety of the District Court entertaining Wade's petition relates to the effect of his failure to seek a writ of certiorari from this Court following the action of the Supreme Court of Florida on his *habeas corpus* appeal. It has been said that "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." *Ex parte Hawk,* 321 U. S. 114, 116–117. The problem is to reexamine this statement in the light of the facts of this case.

The requirement that state remedies be exhausted before relief is sought in the federal courts is grounded primarily upon the respect which federal courts have for the state judicial processes and upon the administrative necessities of the federal judiciary. State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty. Only after state remedies have been exhausted without the federal claim having been vindicated may federal courts properly intervene. Indeed, any other rule would visit upon the federal courts an impossible burden,

forcing them to supervise the countless state criminal proceedings in which deprivations of federal constitutional rights are alleged.

But the reasons for this exhaustion principle cease after the highest state court has rendered a decision on the merits of the federal constitutional claim. The state procedure has then ended and there is no longer any danger of a collision between federal and state authority. The problem shifts from the consummation of state remedies to the nature and extent of the federal review of the constitutional issue. The exertion of such review at this point, however, is not in any real sense a part of the state procedure. It is an invocation of federal authority growing out of the supremacy of the Federal Constitution and the necessity of giving effect to that supremacy if the state processes have failed to do so.

After state procedure has been exhausted, the concern is with the appropriate federal forum in which to pursue further the constitutional claim. The choice lies between applying directly to this Court for review of the constitutional issue by certiorari or instituting an original *habeas corpus* proceeding in a federal district court. Considerations of prompt and orderly procedure in the federal courts will often dictate that direct review be sought first in this Court. And where a prisoner has neglected to seek that review, such failure may be a relevant consideration for a district court in determining whether to entertain a subsequent *habeas corpus* petition.

But the factors which make it desirable to present the constitutional issue directly and initially to this Court do not justify a hard and fast rule to that effect, especially in view of the volume of this Court's business. Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon

the denial of the writ. Where it is apparent or even possible that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a *habeas corpus* application in a district court. Good judicial administration is not furthered by insistence on futile procedure.

Moreover, the flexible nature of the writ of *habeas corpus* counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ. *Habeas corpus* is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty. Cf. *Price* v. *Johnston,* 334 U. S. 266, 283. Where the matter is otherwise within the jurisdiction of the district court, it is within the discretion of that court to weigh the failure to seek certiorari against the miscarriage of justice that might result from a failure to grant relief. In short, we refuse to codify the failure to invoke the discretionary certiorari powers of this Court into an absolute denial of the district court's power to entertain a *habeas corpus* application. The prevention of undue restraints on liberty is more important than mechanical and unrealistic administration of the federal courts.

Fear has sometimes been expressed that the exercise of the district court's power to entertain *habeas corpus* petitions under these circumstances might give rise to frequent instances of a single federal judge upsetting the judgment of a state court, often the highest court of the state. But to restrict the writ of *habeas corpus* for such reason is to limit it on the basis of a discredited fear. Experience has demonstrated that district court judges have used this power sparingly and that only in a negligible number of instances have convictions sustained by state courts been reversed. Statistics compiled

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by the Administrative Office of the United States Courts show that during the fiscal years of 1943, 1944 and 1945 there was an average of 451 *habeas corpus* petitions filed each year in federal district courts by prisoners serving state court sentences; of these petitions, an average of but 6 per year resulted in a reversal of the conviction and a release of the prisoner. The releases thus constituted only 1.3% of the total petitions filed. In light of such figures, it cannot be said that federal judges have lightly exercised their power to release prisoners held under the authority of a state. See *Ex parte Royall,* 117 U. S. 241, 253.

In the instant case, we believe that it was well within the discretion of the District Court to consider Wade's petition for a writ of *habeas corpus.* The Florida courts had given a full and conclusive answer to his claim that he had been denied his constitutional right to counsel. No other remedies were available in Florida. True, he did not seek certiorari following the dismissal of his *habeas corpus* appeal by the Supreme Court of Florida. But at the time of that dismissal, it was extremely doubtful, to say the least, whether the constitutional issue had really been decided. That doubt was such as to make it reasonably certain that this Court would have denied certiorari on the theory that an adequate state ground appeared to underlie the judgment. His failure to make this futile attempt to secure certiorari accordingly should not prejudice his subsequent petition for *habeas corpus* in the District Court. Otherwise he would be left completely remediless, having been unable to secure relief from the Florida courts and being barred from invoking the aid of the federal courts.

As to the merits of Wade's constitutional claim, the District Court made the following findings after a hearing at which Wade and the trial judge gave testimony:

"The Court has heard the evidence of the respective parties and the argument of their counsel. It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. . . . The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. . . ."

As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors and excuse as many as six without reason, a right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross-examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney.

We are not disposed to disagree with the findings and conclusion of the District Court. Its determination was a purely factual one to the effect that Wade was an inexperienced youth incapable of adequately representing himself even in a trial which apparently involved no complicated legal questions. This is a judgment which is peculiarly within the province of the trier of facts,

based upon personal observation of Wade. And we do not find that the District Court's determination was clearly erroneous.

There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.

The Circuit Court of Appeals was therefore in error in reversing the District Court's judgment. It was also in error in assuming that the failure to appoint counsel in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the state requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not from state statutes. *Betts* v. *Brady*, 316 U. S. 455, 473.

Reversed.

MR. JUSTICE REED, dissenting.

Donald Wade was brought to trial March 14, 1945, in the Criminal Court of Record of Palm Beach County, Florida. On the same day, after proceedings before the presiding judge in which Wade represented himself, he was convicted of the crime of breaking and entering, and sentenced to five years' imprisonment. Wade did not appeal his conviction, but on March 16, 1945, having obtained the aid of counsel, he brought a petition for a writ of habeas corpus in the Circuit Court of Palm Beach County; on March 22, 1945, that court quashed the writ; an appeal from the order quashing the writ was taken to the Supreme Court of Florida and on May

14, 1945, that court dismissed the appeal without stating whether it disposed of the case on the merits or upon a procedural ground.[1] However, in a later case, *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585, the Florida Supreme Court indicated that its ruling in the *Wade* case had been upon the merits. For the purposes of this opinion, I assume that this decision was upon the merits. Wade failed to bring a writ of certiorari to this Court to review the action of the state Supreme Court. On May 8, 1946, a petition for a writ of habeas corpus was filed in the Federal District Court for the Southern District of Florida. The writ was granted and a hearing set for May 17, 1946. At the hearing the court examined Wade's claim that he had been deprived of his constitutional rights by the failure of Florida to furnish him with counsel. It concluded that Wade had been deprived of those rights and ordered that he be released from the custody of the respondent, Mayo, and be remanded to the custody of the sheriff of Palm Beach County, Florida, to be held for any further proceedings which the state should take. On appeal, the Circuit Court of Appeals for the Fifth Circuit reversed the lower court. It held that the Constitution does not require that a state furnish counsel to one in the position of Wade. It based this conclusion, we think, from examination of its opinion, on *Betts* v. *Brady,* 316 U. S. 455, not on any ruling that state law determines the necessity for the appointment of counsel in state cases in all non-capital prosecutions.[2] We granted certiorari, 331 U. S. 801; the case was submitted to us; on November 10, 1947, we ordered the case restored to the docket for reargument, directing that counsel discuss these questions: "(1) the propriety of the exercise of jurisdiction by the District Court in this case

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[1] *Wade* v. *Kirk,* 155 Fla. 906, 23 So. 2d 163.

[2] *Mayo* v. *Wade,* 158 F. 2d 614.

when it appears of record, in the state's motion for dismissal of the appeal on habeas corpus, that petitioner had not availed himself of the remedy of appeal from his conviction, apparently open after trial though now barred by limitation . . . (2) whether the failure of Florida to make this objection in this proceeding affects the above problem."

I.

The first question in this case is whether Wade's failure to bring a writ of certiorari to this Court from the judgment of the Florida Supreme Court in his state habeas corpus proceeding should affect his effort to obtain release through a federal writ of habeas corpus. Or, to rephrase the problem, should certiorari to this Court be considered a part of the state remedy for purposes of the well-recognized doctrine of exhaustion of state remedies? *Mooney* v. *Holohan,* 294 U. S. 103.

This inquiry may be started by considering *Ex parte Hawk,* 321 U. S. 114. The unanimous opinion in this case was handed down January 31, 1944. Hawk had made a motion for leave to file a writ of habeas corpus in this Court. His application was denied on the ground that he had failed to exhaust the state remedies available to him. The opinion in Hawk's case, however, has been understood by this and other courts as having been designed to give direction for procedure to federal courts in their consideration of applications for habeas corpus brought by a person confined under a state criminal conviction.[3] One of the rules which this Court prescribed governs the issue now under consideration.

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[3] This Court has, in a number of instances, through its Clerk, distributed this opinion to state prisoners seeking habeas corpus relief in federal courts.

Potter v. *Dowd,* 146 F. 2d 244, 248: "The Hawk decision is the latest of the Supreme Court on the subject. It was no doubt in-

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. *Tinsley* v. *Anderson,* 171 U. S. 101, 104–5; *Urquhart* v. *Brown,* 205 U. S. 179; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Mooney* v. *Holohan, supra,* 115; *Ex parte Abernathy,* 320 U. S. 219." [4]

After a person, protected by the presumption of innocence, has been convicted by a state trial court and his conviction has been subjected either to direct or collateral attacks in the state courts,[5] wise administration commands that this Court be asked, by appeal or certiorari, to pass upon the federal constitutional questions presented.[6] It is only by such a procedure that the validity of state criminal conviction can be expeditiously and finally adjudicated.[7]

The lower federal courts have consistently followed this rule of practice. Some district judges have used form let-

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tended to enlighten the Federal inferior courts so that the rather difficult road which they must travel will have fewer obstructions. Also, the convict who believes he has been denied rights guaranteed him by the Federal Constitution will find the proper judicial haven he is seeking."

[4] *Ex parte Hawk, supra,* at 116–17.

[5] If a state judgment is based upon an adequate state ground, a failure to request review by this Court does not prejudice the prisoner. *White* v. *Ragen,* 324 U. S. 760, 767; *House* v. *Mayo,* 324 U. S. 42, 48.

[6] At pp. 691–692, *infra,* I comment upon the delicate nature of the federal habeas corpus jurisdiction over state convictions. Those observations are relevant here.

[7] See pp. 694–695, *infra.*

ters which they sent to convicts confined in state prisons who sought habeas corpus.[8] In *Gordon* v. *Scudder,* 163 F. 2d 518, the Circuit Court of Appeals for the Ninth Circuit applied the rule to a state habeas corpus proceeding in which the habeas corpus had been denied without opinion. All of the circuit courts which have considered this rule have approved it.[9]

Today the Court both limits and confuses the doctrine of exhaustion of state remedies so clearly expounded in *Ex parte Hawk, supra.* Certainty in habeas corpus pro-

[8] An example of such a letter appears in the record in *Ex parte Hanley,* 322 U. S. 708:

"Your petition for writ of habeas corpus has been received and examined. From such examination, it appears that, if filed, your petition would have to be dismissed for the reason that it does not appear therefrom that you have exhausted your remedies in the Supreme Court of the United States, in accordance with the suggestion contained in a recent opinion of the Supreme Court of the United States in the case of *Ex parte Henry Hawk* (filed January 31, 1944), wherein the court said:

" 'Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts *and in this court by appeal or writ of certiorari,* have been exhausted.'

Accordingly, your petition has not been filed and is returned herewith. If, however, you desire to make a record in this court, you may return the petition (referring to this letter) with the request that it be filed, and it will be filed in the office of the clerk of this court.

"I do not wish to be understood as expressing any opinion on the merits of your case."

[9] See *Lyon* v. *Harkness,* 151 F. 2d 731, 733 (C. C. A. 1st); *Monsky* v. *Warden of Clinton State Prison,* 163 F. 2d 978, 979 (C. C. A. 2d); *Stonebreaker* v. *Smyth,* 163 F. 2d 498, 501–502 (C. C. A. 4th); *Nusser* v. *Aderhold,* 164 F. 2d 127 (C. C. A. 5th); *Makowski* v. *Benson,* 158 F. 2d 158 (C. C. A. 6th); *Ross* v. *Nierstheimer,* 159 F. 2d 994 (C. C. A. 7th); *Guy* v. *Utecht,* 144 F. 2d 913, 915 (C. C. A. 8th); *Gordon* v. *Scudder, supra* (C. C. A. 9th); *Herzog* v. *Colpoys,* 79 U. S. App. D. C. 81, 143 F. 2d 137, 138.

cedure for review of state convictions is essential so that the applicant may know the way to test the constitutionality of his conviction and so that the public and its judicial system may be spared undue expense and interference from a succession of petitions that cannot be considered on the merits because of procedural defects. The serious and difficult problems of habeas corpus procedure in the federal courts cannot be solved by rules which have as their very core vagueness and uncertainty.[10] I conclude that certiorari should be considered a part of the state procedure for purposes of habeas corpus.

II.

The next issue is this. Can Wade, having failed to use a state remedy once available [11]—appeal—and having failed to take a writ of certiorari to this Court from the denial of his state habeas corpus, with no conditions existing or claimed that restricted his ability to proceed in the regular course in the handling of his case after verdict, obtain relief in a federal habeas corpus proceeding for an alleged deprivation of his constitutional right to counsel when it appears that no state remedy in which relief can be obtained is now available? [12]

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[10] Cf. dissent in *Maggio* v. *Zeitz*, 333 U. S. 56, 81.

[11] "An appeal . . . may be taken only within ninety days after the judgment or sentence appealed from is entered, except that an appeal from both judgment and sentence may be taken within ninety days after the sentence is entered." 24 Fla. Stat. Ann. § 924.09.

[12] Florida provides two devices for collateral attack upon criminal convictions: habeas corpus and coram nobis. Wade has tried habeas corpus and failed. *Wade* v. *Kirk*, 155 Fla. 906, 23 So. 2d 163. Coram nobis is available only to bring to the attention of the court specific facts, existing at the time of the trial, but not shown by the record and not known by the court or by the defendant or his counsel at the time of the trial. *Lamb* v. *State*, 91 Fla. 396, 107 So. 535. See *House* v. *State*, 130 Fla. 400, 177 So. 705; cf. *Hysler* v. *Florida*,

The federal courts have the power to discharge upon a writ of habeas corpus "a prisoner . . . in custody in violation of the Constitution . . . of the United States . . . ." [13] This Court held in *Frank* v. *Mangum*, that this writ is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution . . . ." [14] The dissent in the *Frank* case agreed with the Court's theory of the availability of habeas corpus, saying at p. 346: "But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." As Wade alleged a deprivation of his constitutional rights, the district court had jurisdiction to entertain the petition for the writ of habeas corpus.

Habeas corpus is, however, a discretionary writ.[15] Thus, the question presented is this: Was it proper for the

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315 U. S. 411, 415–16. The facts upon which Wade seeks relief were known, during the course of the trial, both to himself and to the trial judge.

[13] 28 U. S. C. §§ 451–53. Under the Judiciary Act of 1789, the writ could not issue if the prisoner was held under final process based upon a judgment of a court of competent jurisdiction. *Ex parte Watkins*, 3 Pet. 193. By the Act of February 5, 1867, Congress expanded the power of the federal courts to issue the writ in situations in which the Federal Constitution has been violated. 14 Stat. 385, ch. 28; see *Hawk* v. *Olson*, 326 U. S. 271, 274–75; *Frank* v. *Mangum*, 237 U. S. 309, 330–32.

[14] *Frank* v. *Mangum*, 237 U. S. 309, 331.

[15] *Ex parte Royall*, 117 U. S. 241, 250 *et seq.*; *In re Wood*, 140 U. S. 278, 290; *Cook* v. *Hart*, 146 U. S. 183, 195; *In re Frederich*, 149 U. S. 70, 75; *New York* v. *Eno*, 155 U. S. 89; *In re Lincoln*, 202 U. S. 178, 181; *Urquhart* v. *Brown*, 205 U. S. 179; *Salinger* v. *Loisel*, 265 U. S. 224, 231; *Goto* v. *Lane*, 265 U. S. 393, 403; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17; *Ex parte Hawk*, 321 U. S. 114.

district court to exercise its jurisdiction when it appeared of record that Wade had not availed himself of the remedy of appeal, open after trial though now barred by limitation, and had failed to exhaust, by writ of certiorari, the state remedy of habeas corpus? An answer to this problem can best be derived from a consideration of the nature and function of habeas corpus in a federal system of government, the relevant precedents and analogies drawn from the decided habeas corpus cases, and the resolution of similar questions in related fields.

State judicial systems are designed to provide places of trial for offenders against the criminal laws of their respective states. State courts equally with federal courts administer justice under the authority and limitations of the Constitution of the United States, the supreme law of the land, binding the judges in every state "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [16] Thus, whenever a prisoner brings a petition for a writ of habeas corpus in the federal courts challenging collaterally a conviction in the state courts and asking release from state custody, serious questions of the relation between the federal and state judicial structures are raised. "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus,* be taken out of the custody of the officers of the State and finally discharged therefrom . . . ." [17] Respect for the theory and practice of our dual system of government requires that federal courts intervene by habeas corpus in state criminal prosecutions only in exceptional circumstances. Their duty compels them to act where the state fails to provide a

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[16] Const., Art. VI; *Robb* v. *Connolly,* 111 U. S. 624, 637.

[17] *Baker* v. *Grice,* 169 U. S. 284, 291.

remedy for violations of constitutional rights but due regard for a state's system of justice admonishes federal courts to be chary of allowing the extraordinary writ of habeas corpus where the accused, without excuse, has not exhausted the remedies offered by the State to redress violations of federal constitutional rights.[18]

The desirability of discretionary limitation of the habeas corpus power of federal courts in respect to state criminal prosecutions which inheres in the dual sovereignties of the federal system is re-enforced by considerations of practical administration: (1) it is not to be assumed that state courts deliberately deny to the individual his rights under the Federal Constitution; (2) the normal paths of review—appeal and petition for certiorari—are open to correct federal constitutional errors in state criminal proceedings; (3) extravagant exercise of federal jurisdiction would furnish another technique of delay in a criminal system which often permits long periods of time to elapse between sentencing and execution of sentence.

Because of the above reasons, the federal courts exercise their habeas corpus jurisdiction where an individual is in the custody of a state in limited types of situations. For example: (1) where all state remedies have been exhausted; (2) where the state remedy is seriously inadequate; [19] and (3) where a state attempts to interfere improperly with the Federal Government.

The third class of cases represents the largest group of situations in which federal courts exercise habeas corpus jurisdiction without the exhaustion of state remedies. The cases of this type which have come before this Court are examples of the use of habeas corpus to prevent state

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[18] See *Frank* v. *Mangum*, 237 U. S. 309, 329; *Ex parte Royall*, 117 U. S. 241, 247–54; *Mooney* v. *Holohan*, *supra*.

[19] See *Ex parte Hawk*, 321 U. S. 114, 118.

interference with the administration of a branch of the Federal Government,[20] or with a federal agency,[21] or with treaty rights of the United States.[22]

The second class is represented in this Court by only one case, *Moore* v. *Dempsey,* 261 U. S. 86. There exhaustion of state remedies was not required.[23] "We assume in accordance with that case [*Frank* v. *Mangum,* 237 U. S. 309, 335] that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. . . . But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." [24] That *Moore's* case is unique, emphasizes its unusual nature; this Court has not again been compelled to resort to this extreme procedure to protect constitutional rights.

The greatest number of habeas corpus cases in the federal courts fall into class one. In *Ex parte Hawk, supra,* we stated the principle which governs these cases: "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction

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[20] *In re Neagle,* 135 U. S. 1; *Hunter* v. *Wood,* 209 U. S. 205 (impairment of the functions of the federal courts); *In re Loney,* 134 U. S. 372 (impairment of the functions of the legislative and judicial branches of the Federal Government).

[21] *Boske* v. *Comingore,* 177 U. S. 459; *Ohio* v. *Thomas,* 173 U. S. 276.

[22] *Wildenhus's Case,* 120 U. S. 1.

[23] See *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609.

[24] *Moore* v. *Dempsey, supra,* at 91.

for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. . . ." [25] Litigation of this category offers the best example of the general principle of federal-habeas-corpus restraint. The insistence that state remedies be exhausted is but a concise statement of the proposition that state courts must, in all but the most exceptional cases, be the forums in which all the problems incident to a state criminal prosecution are to be answered.

Where a state offers an adequate remedy for the correction of errors in criminal trials, that remedy must be followed. Where there is a denial of constitutional rights by the highest court of a state, a remedy exists by direct review in this Court.[26] An accused should not be permitted to reserve grounds for a habeas corpus petition in federal courts which would have furnished a basis for a review in regular course in the state court; not even when those grounds are that the accused was denied a constitutional right by a state court subject to reversal by a higher state court.[27] To permit such trifling with state criminal law would disrupt its efficient administration. The federal court's refusal of consideration depends on the rule that the federal courts should not utilize habeas corpus to take the place of state remedies except in extraordinary situations where otherwise the accused

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[25] *Ex parte Hawk, supra,* at 116–17.

[26] *Powell* v. *Alabama,* 287 U. S. 45; *Urquhart* v. *Brown,* 205 U. S. 179.

[27] *Andrews* v. *Swartz,* 156 U. S. 272, 276; *In re Wood,* 140 U. S. 278, 289; *Ex parte Spencer,* 228 U. S. 652. See *Glasgow* v. *Moyer,* 225 U. S. 420, 430; *Waley* v. *Johnston,* 316 U. S. 101, 105; *Sunal* v. *Large,* 332 U. S. 174. *Bowen* v. *Johnston,* 306 U. S. 19, 27: "The rule is not one defining power but one which relates to the appropriate exercise of power."

would be "remediless." [28] It is not seemly that years after a conviction, when time has dulled memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of any claim of unfairness in their trial, should be permitted to attack their sentences collaterally by habeas corpus because of errors known to them at the time of trial. When it is shown by the record that a petitioner in a federal court for relief from a state conviction that involves a denial of constitutional rights has without adequate excuse failed to use an available state judicial remedy, although all such remedies are now barred to him by limitation, I think that federal courts should not intervene to correct the error.

In *Goto* v. *Lane,* 265 U. S. 393, this Court was asked to consider the issue of whether a group of prisoners, convicted of a crime in the territorial courts of Hawaii, had the right to raise in a habeas corpus proceeding brought in a federal district court alleged deprivations of their constitutional rights. The Court said: "And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute." [29] The Court found no reasons which, in the exercise of a sound judicial discretion, excused the petitioners from seeking review by writ of error. Consequently, it affirmed the judgment of the district court which had refused to issue the writ. This case is a persuasive precedent in the situation now before us because the state courts of the forty-eight states and the territorial courts of Hawaii stood, in 1924, in

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[28] *Ex parte Hawk, supra,* 117–18. See *Adams* v. *McCann,* 317 U. S. 269, 274; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13, 17.

[29] *Goto* v. *Lane, supra,* at 402. See also *Urquhart* v. *Brown,* 205 U. S. 179; *Riddle* v. *Dyche,* 262 U. S. 333; *Craig* v. *Hecht,* 263 U. S. 255, 277.

similar positions in relation to the federal judicial structure. As the scope of review of this Court in criminal cases from state courts and Hawaiian territorial courts was then the same, no valid distinctions can be drawn between *Goto's* case and the situation now before us.[30]

It should not be thought that the practice which I would follow represents the sole instance in our jurisprudence of the loss of the right to press constitutional questions because of failure on the part of the individual to raise those issues properly or in time. The principle that federal constitutional questions must be properly raised in state courts before they will be considered by this Court is too well established to require citation. In a case decided this Term, *Parker* v. *Illinois,* 333 U. S. 571, Parker was held to have lost his right to raise federal constitutional questions because of state procedure which required that those questions be raised by direct appeal to the state Supreme Court. Parker appealed his case to the intermediate Appellate Court and, consequently, lost any chance of an adjudication by this Court of those issues.[31]

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[30] The Act of April 30, 1900, which established a government for the Territory of Hawaii, provided that: "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." 31 Stat. 158. In 1925, the Circuit Court of Appeals for the Ninth Circuit was given power to review final decisions from the Supreme Court of Hawaii in all criminal cases ". . . wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved . . . ." 43 Stat. 936. This power is still retained and cases from the territorial courts now come to this Court only after they have been reviewed by the Ninth Circuit Court of Appeals. 28 U. S. C. § 225.

[31] See also *Central Union Co.* v. *Edwardsville,* 269 U. S. 190.

III.

It seems to me that the considerations, analogies, and precedents discussed above admit of only one answer to the basic problem of this case. This petitioner had counsel in ample time to permit a petition for certiorari to this Court. There is not a suggestion in the record of any interference, through his own disabilities or otherwise, with petitioner's right to secure, through counsel of his own choice, review of his allegedly erroneous conviction.[32] Therefore, I think that the District Court to whom this petition for a writ of habeas corpus from a conviction in a state court was presented should have refused cognizance of the writ, *sua sponte,* since the record showed that state remedies were available[33] after the alleged denial of constitutional rights and that the petitioner neglected to take advantage of those remedies.[34] "Available" as here used carries the connotation of ability and opportunity to take advantage of the state procedure.[35] Florida's

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[32] In this the case differs from *Williams* v. *Kaiser,* 323 U. S. 471, 472; *Tomkins* v. *Missouri,* 323 U. S. 485, 486; *Smith* v. *O'Grady,* 312 U. S. 329, 334.

[33] A state can leave a procedure open through its own courts by which constitutional questions may be raised at any time. If the state court passes upon the merits, this Court can review the constitutional question upon appeal or petition for certiorari. *Herndon* v. *Lowry,* 301 U. S. 242, 247. See *Lovelady* v. *Texas,* 333 U. S. 867 (cert. granted), *id.* 333 U. S. 879 (dismissed), *Ex parte Lovelady,* — Tex. Cr. R. —, 207 S. W. 2d 396.

[34] I would not here decide whether or not this rule applies to cases which are governed by the principle of *Moore* v. *Dempsey, supra,* or to the situation in which a state attempts to interfere improperly with the Federal Government.

[35] For example, if Wade had not been able to obtain counsel until too late for an appeal, appeal would not have been a remedy "available" to him. See *Price* v. *Johnston,* 334 U. S. 266; *De Meerleer* v. *Michigan,* 329 U. S. 663; *Downer* v. *Dunaway,* 53 F. 2d 586, 589–91.

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failure to object to consideration of the petition for habeas corpus because certiorari was not requested cannot have the effect of authorizing a federal court to examine into the validity of the conviction. The reason for not allowing habeas corpus in such cases does not depend upon state acquiescence but upon the federal judicial policy of non-interference with state criminal administration unless there has been complete use and final exhaustion of state remedies.

On the hypothesis that the decision of the Florida Supreme Court dismissing Wade's appeal from the order of the Circuit Court of Palm Beach County, Florida, was entered on the ground that the remedy in Florida for the denial of the right to counsel was by appeal instead of habeas corpus, Wade stands in no better position. If that was the real basis of the dismissal of the appeal, Wade failed to avail himself of the remedy of appeal then open to him in Florida, though now foreclosed by limitation. No doubt his counsel by motion could have obtained a ruling from the Florida Supreme Court as to whether their dismissal was on a federal or state ground in view of the then rule of this Court in *Ex parte Hawk, supra,* at 117, that an applicant for habeas corpus in federal courts must exhaust state remedies including appeal or certiorari to this Court. This would have permitted Wade to bring his constitutional question here for review under a regular course of procedure. If the Florida Supreme Court had refused a clarifying order, this Court would have had resources for reaching a conclusion in such a situation. See *Loftus* v. *Illinois,* 334 U. S. 804. Consequently, I think that the judgment of the Circuit Court of Appeals should be affirmed and the case remanded to the District Court with instructions that the petition for habeas corpus be dismissed.

THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join in this dissent.

TRUPIANO ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 427. Argued March 9, 1948.—Decided June 14, 1948.

Federal agents who had known for at least three weeks that a building on a farm was being used for illicit distilling made a nighttime raid thereon without a warrant of arrest or a search warrant. They were led onto the farm and to the building by the owner, who was an informer. Through an open door they saw one of the petitioners engaged in illicit distilling. An agent entered, arrested him, and seized the contraband apparatus and material. The other petitioners were arrested later. Charged with violations of federal revenue laws, they moved to suppress the evidence as having been obtained in violation of the Fourth Amendment of the Federal Constitution. *Held:*

1. The arrest was lawful as an arrest of a person who was committing a felony in the discernible presence of a law-enforcement officer at a place where the officer was lawfully present. Pp. 700–705.

(a) The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not invalidate an arrest under these circumstances. P. 705.

2. The seizure of the contraband property was in violation of the Fourth Amendment and not justified as incident to the lawful arrest. Pp. 705–710.

(a) In the circumstances of this case, there was no excuse for failure to obtain a search warrant. Pp. 705–706, 708.

(b) The fact that the property actually seized was contraband, which doubtless would have been described in a warrant had one issued, does not legalize the seizure. P. 707.

(c) The proximity of the contraband property to the arrested person at the moment of his arrest was a fortuitous circumstance inadequate to legalize the seizure. Pp. 707–708.

(d) The presence or absence of an arrestee at the exact time and place of a foreseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. P. 708.

(e) The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. P. 708.

(f) *Harris* v. *United States,* 331 U. S. 145, distinguished; *Taylor* v. *United States,* 286 U. S. 1, followed. Pp. 708–709.

3. Petitioners were entitled to have the unlawfully seized property suppressed as evidence; but, since the property was contraband, they were not entitled to have it returned to them. P. 710.

163 F. 2d 828, reversed.

Petitioners, charged with violations of federal revenue laws, moved to suppress certain evidence alleged to have been illegally obtained. An order of the District Court denying the motion, 70 F. Supp. 764, was affirmed by the Circuit Court of Appeals, 163 F. 2d 828. This Court granted certiorari. 332 U. S. 841. *Reversed,* p. 710.

Frank G. Schlosser argued the cause for petitioners. With him on the brief was *Anthony A. Calandra.*

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg.*

Mr. Justice Murphy delivered the opinion of the Court.

This case adds another chapter to the body of law growing out of the Fourth Amendment to the Constitution of the United States. That Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In other words, the Fourth Amendment is a recognition of the fact that in this nation individual liberty depends in large part upon freedom from unreasonable intrusion by those in authority. It is the duty of this Court to give effect to that freedom.

In January, 1946, the petitioners sought to lease part of the Kell farm in Monmouth County, New Jersey, and to erect a building thereon. Kell suspected that they intended to build and operate an illegal still. He accordingly reported the matter to the appropriate federal authority, the Alcohol Tax Unit of the Bureau of Internal Revenue. The federal agents told Kell to accept the proposition, provided he did nothing to entice or encourage the petitioners into going ahead with their plans and provided he kept the agents informed of all developments. Nilsen, one of the agents, was assigned in February to work on the farm in the disguise of a "dumb farm hand" and to accept work at the still if petitioners should offer it.

Toward the end of March, 1946, Kell agreed with petitioners to let them rent part of his farm for $300 a month. Kell and Nilsen assisted petitioners in the erection of the building, a roughly constructed barn about 200 yards from the Kell farmhouse. Nilsen also assisted in the erection of the still and the vats.

Operation of the still began about May 13, 1946. Nilsen thereafter worked as "mash man" at a salary of $100 a week, which he turned over to the Government. During this period he was in constant communication with his fellow agents. By prearrangement, he would meet one or more of the agents at various places within a few miles of the Kell farm; at these meetings "the conversation would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm." On May 20 he met with one of his superior officers and gave him samples of alcohol, several sugar bags, a yeast wrapper and an empty five-gallon can which had been taken from the still premises.

On May 26 Nilsen received a two-way portable radio set from his superiors. He used this set to transmit frequent bulletins on the activities of the petitioners. On

the basis of radio intelligence supplied by Nilsen, a truckload of alcohol was seized on May 31 about an hour after it had left the farm.

At about 9 p. m. in the evening of June 3, 1946, Nilsen radioed his superior that the still operators were awaiting the arrival of a load of sugar and that alcohol was to be taken from the farm when the sugar truck arrived. Nilsen apparently knew then that a raid was scheduled for that night, for he told Kell during the evening that "tonight is the night." He radioed at 11 p. m. that the truck had been delayed but that petitioners Roett and Antoniole were at the still.

Three federal agents then drove to within three miles of the farm, at which point they were met by Kell. The remainder of the distance was traversed in Kell's automobile. They arrived at the farm at about 11:45 p. m. The agents stated that the odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven onto the farm premises; the odor became stronger and the noise louder as they alighted from the car and approached the building containing the still. Van De Car, one of the agents, went around one end of the building. Looking through an open door into a dimly lighted interior he could see a still column, a boiler and a gasoline pump in operation. He also saw Antoniole bending down near the pump. He entered the building and placed Antoniole under arrest. Thereupon he "seized the illicit distillery."

After this arrest and seizure, Van De Car looked about further and observed a large number of five-gallon cans which he later found to contain alcohol and some vats which contained fermenting mash. Another agent, Casey, testified that he could see several of these cans through the open door before he entered; he subsequently counted the cans and found that there were 262 of them. After he entered he saw the remainder of the distillery

equipment, including four large mash vats. The third agent, Gettel, proceeded to a small truck standing in the yard and "searched it thoroughly for papers and things of an evidentiary nature." It does not appear whether he was successful in his search or whether he took anything from the truck.

A few minutes later Roett was arrested outside the building. Petitioners Trupiano and Riccardelli apparently were arrested later that night by other agents, the place and the circumstances not being revealed by the record before us. In addition, three other persons were arrested that night because of their connections with the illegal operations; one of them, who was unknown to Nilsen, was arrested when he arrived at the farm with a truck loaded with coke.

The agents engaged in this raid without securing a search warrant or warrants of arrest. It is undenied that they had more than adequate opportunity to obtain such warrants before the raid occurred, various federal judges and commissioners being readily available.

All of the persons arrested were charged with various violations of the Internal Revenue Code arising out of their ownership and operation of the distillery. Prior to the return of an indictment against them, the four petitioners filed in the District Court for the District of New Jersey a motion alleging that the federal agents had illegally seized "a still, alcohol, mash and other equipment," and asking that "all such evidence" be excluded and suppressed at any trial and that "all of the aforesaid property" be returned. The District Court denied the motion after a hearing, holding that the seizure was reasonable and hence constitutional. 70 F. Supp. 764. The Circuit Court of Appeals for the Third Circuit affirmed *per curiam* the order of the District Court. 163 F. 2d 828.

Thus we have a case where contraband property was seized by federal agents without a search warrant under

circumstances where such a warrant could easily have been obtained. The Government, however, claims that the failure to secure the warrant has no effect upon the validity of the seizure. Reference is made to the well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence, *Carroll* v. *United States*, 267 U. S. 132, 156–157, a right said to be unaffected by the fact that there may have been adequate time to procure a warrant of arrest. Since one of the petitioners, Antoniole, was arrested while engaged in operating an illegal still in the presence of agents of the Alcohol Tax Unit, his arrest was valid under this view even though it occurred without the benefit of a warrant. And since this arrest was valid, the argument is made that the seizure of the contraband open to view at the time of the arrest was also lawful. Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States, supra*, 158; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lee*, 274 U. S. 559, 563; *Marron* v. *United States*, 275 U. S. 192, 198–199; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Harris* v. *United States*, 331 U. S. 145, 150–151.

We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act

felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully present. Common sense then dictates that an arrest in that situation is valid despite the failure to obtain a warrant of arrest.

But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. *Carroll* v. *United States, supra,* 156; *Go-Bart Co.* v. *United States, supra,* 358; *Taylor* v. *United States,* 286 U. S. 1, 6; *Johnson* v. *United States,* 333 U. S. 10, 14–15. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *United States* v. *Lefkowitz, supra,* 464. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

The facts of this case do not measure up to the foregoing standard. The agents of the Alcohol Tax Unit knew every detail of the construction and operation of the illegal distillery long before the raid was made. One of them was assigned to work on the farm along with the illicit operators, making it possible for him to secure and report the minutest facts. In cooperation with the farm owner, who served as an informer, this agent was in a position to supply information which could easily have formed the basis for a detailed and effective search warrant. Concededly, there was an abundance of time during which such a warrant could have been secured, even on the night of the raid after the odor and noise of the distillery confirmed their expectations. And the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant; especially is this so since one of them was on hand at all times to report and guard against such a move. See *United States* v. *Kaplan,* 89 F. 2d 869, 871.

What was said in *Johnson* v. *United States, supra,* 15, is equally applicable here: "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. . . . If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

And so when the agents of the Alcohol Tax Unit decided to dispense with a search warrant and to take matters into their own hands, they did precisely what the Fourth Amendment was designed to outlaw. Uninhibited by any limitations that might have been contained in a warrant, they descended upon the distillery in a mid-

night raid. Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present. The limitless possibilities afforded by the absence of a warrant were epitomized by the one agent who admitted searching "thoroughly" a small truck parked in the farmyard for items of an evidentiary character. The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure. See *Amos* v. *United States,* 255 U. S. 313; *Byars* v. *United States,* 273 U. S. 28; *Taylor* v. *United States, supra.*

Moreover, the proximity of the contraband property to the person of Antoniole at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure. As we have seen, the existence of this property and the desirability of seizing it were known to the agents long before the seizure and formed one of the main purposes of the raid. Likewise, the arrest of Antoniole and the other petitioners in connection with the illicit operations was a foreseeable event motivating the raid. But the precise location of the petitioners at the time of their arrest had no relation to the foreseeability or necessity of the seizure. The practicability of obtaining a search warrant did not turn upon whether Antoniole and the others were within the distillery building when arrested or upon whether they were then engaged in operating the illicit equipment. Antoniole just happened to be working amid the contraband surroundings at 11:45 p. m. on the night in question, while the other three petitioners chanced to be some place else. But Antoniole might well have been outside the building at that particular time. If that had been the case and he had been arrested in the farmyard, the entire argument advanced

by the Government in support of the seizure without warrant would collapse. We do not believe that the applicability of the Fourth Amendment to the facts of this case depends upon such a fortuitous factor as the precise location of Antoniole at the time of the raid.

In other words, the presence or absence of an arrestee at the exact time and place of a foreseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us.

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. *Carroll* v. *United States, supra,* 158. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant. In the case before us, however, no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated.

We do not take occasion here to reexamine the situation involved in *Harris* v. *United States, supra.* The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest. That circumstance was wholly lacking in the

Harris case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest. Moreover, the *Harris* case dealt with the seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search. In contrast, the contraband seized in this case could easily have been specified in a prior search warrant. These factual differences may or may not be of significance so far as general principles are concerned. But the differences are enough to justify confining ourselves to the precise facts of this case, leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable.

What we have here is a set of facts governed by a principle indistinguishable from that recognized and applied in *Taylor* v. *United States, supra.* The Court there held that the seizure of illicit whiskey was unreasonable, however well-grounded the suspicions of the federal agents, where there was an abundant opportunity to obtain a search warrant and to proceed in an orderly, judicial way. True, the *Taylor* case did not involve a seizure in connection with an arrest. And the officers there made an unlawful entry onto the premises. But those factors had no relation to the practicability of obtaining a search warrant before making the seizure. It was the time element and the foreseeability of the need for a search and seizure that made the warrant essential. The *Taylor* case accordingly makes plain the illegality of the seizure in the instant proceeding.

The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement. The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and

seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible. The effective operation of government, however, could hardly be embarrassed by the requirement that arresting officers who have three weeks or more within which to secure the authorization of judicial authority for making search and seizure should secure such authority and not be left to their own discretion as to what is to be searched and what is to be seized. Such a requirement partakes of the very essence of the orderly and effective administration of the law.

It is a mistake to assume that a search warrant in these circumstances would contribute nothing to the preservation of the rights protected by the Fourth Amendment. A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. And it is a difference that must be preserved even where contraband articles are seized in connection with a valid arrest.

It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. But since this property was contraband, they have no right to have it returned to them.

Reversed.

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE BURTON concur, dissenting.

Federal officers, following a lawful arrest, seized contraband materials which were being employed in open view in violation and defiance of the laws of the land.

Today, the Court for the first time has branded such a seizure illegal. Nothing in the explicit language of the Fourth Amendment dictates that result. Nor is that holding supported by any decision of this Court.

The material facts are not in dispute. In January, 1946, certain of the petitioners approached one Kell offering to rent a portion of the latter's farm on which a building was to be erected. His suspicions aroused, Kell reported the matter to agents of the Alcohol Tax Unit of the Bureau of Internal Revenue. He was advised that the offer could be accepted provided that nothing was done to entice petitioners into completion of their plans. An agent, Nilsen, was assigned to the farm to act the part of a farm hand in the employ of Kell.

Ultimately, an agreement was entered into whereby Kell rented a portion of his farm to petitioners at $300 a month. Petitioners, with the assistance of Kell and Nilsen, constructed a barn-like structure some two hundred yards from the farmhouse. A still and vats were installed. After the still began operation, Nilsen acted as a "mash man" receiving a salary of $100 a week from petitioners. All sums received by Nilsen were turned over to the Federal Government.

Throughout this period, Nilsen reported regularly to his superiors. As a result of this information, federal agents on May 31, 1946, seized a truckload of alcohol about an hour after it had left the Kell farm.

The night of June 3, 1946, was chosen by the agents to conduct their raid. Kell cooperated fully with the officers and drove three of the agents to the farm in his own car. As the car entered the farm premises, the odor of fermenting mash and the sound of a gasoline motor became apparent. When the agents alighted from the car it was obvious that the sound and the odor were emanating from the building in which the still was located. One of the agents approached the structure and through an

open door observed a still and a boiler. He also saw the petitioner Antoniole bending over a gasoline pump. The agent entered the building and placed Antoniole under arrest on the theory that a crime was being committed in his presence. Subsequently, the agent seized the still, mash vats containing fermenting mash, other distillery equipment, and 262 five-gallon cans containing illicit alcohol. Neither the arrest nor the seizure was effected under the authority of a warrant. Later six other persons were arrested, including three of the petitioners in this case.[1]

There can be no doubt that the activities of petitioners were in flagrant violation of the laws of the United States.[2] It is clear, also, that the materials seized consisted of instrumentalities used by petitioners in their criminal enterprise and contraband goods, possession of which is a crime. The materials and objects falling into the control of the federal agents, therefore, were of the type properly subject to lawful seizure.[3]

Further, it is obvious that entry of the federal agents onto the farm premises was in no sense trespassory or otherwise illegal. *Amos* v. *United States,* 255 U. S. 313 (1921); *Byars* v. *United States,* 273 U. S. 28 (1927).

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[1] Subsequently, petitioners moved the District Court to order the return of the property seized and to suppress its use as evidence. 70 F. Supp. 764 (1947). The motion was denied. The order was affirmed by the Circuit Court of Appeals in a *per curiam* statement. 163 F. 2d 828 (1947).

[2] See §§ 2803, 2810, 2812, 2814, 2831, 2833 of the Internal Revenue Code.

[3] *Boyd* v. *United States,* 116 U. S. 616, 623, 624 (1886); *Weeks* v. *United States,* 232 U. S. 383, 392–393 (1914); *Gouled* v. *United States,* 255 U. S. 298, 309 (1921); *Carroll* v. *United States,* 267 U. S. 132, 149–150 (1925); *Agnello* v. *United States,* 269 U. S. 20, 30 (1925); *Marron* v. *United States,* 275 U. S. 192, 199 (1927); *United States* v. *Lefkowitz,* 285 U. S. 452, 465–466 (1932); *Harris* v. *United States,* 331 U. S. 145, 154 (1947).

Kell, the owner of the farm, gave his active consent to the entry. Indeed, he voluntarily drove three of the agents to the premises in his own car.

Nor can there be doubt that the arrest of the petitioner Antoniole while engaged in the commission of a felony in the presence of the agent was a valid arrest. The majority of the Court explicitly concedes such to be the fact. Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony. This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amendment.[4] Since that time it has received general application by state and federal courts.[5] Indeed, this Court has heretofore given specific recognition to the rule. *Carroll* v. *United States,* 267 U. S. 132, 156–157 (1925).[6]

Thus, even though agents charged with enforcement of the laws of the United States made a lawful entry onto the farm and despite the fact that a valid arrest was made of a party who was in the act of committing a felony, the Court now holds that the arresting officer in the absence of a search warrant was powerless to make a valid seizure of contraband materials located in plain sight in the structure in which the arrest took place. And this despite the long line of decisions in this Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers

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[4] *Samuel* v. *Payne,* 1 Doug. K. B. 359 (1780); *Wakely* v. *Hart,* 6 Binn. 316 (1814). And see 2 Hale, Pleas of the Crown 85–97; 4 Blackstone, Commentaries 292–293; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673.

[5] *United States* v. *Daison,* 288 F. 199 (1923); *Rohan* v. *Sawin,* 5 Cush. 281 (1850); *Wade* v. *Chaffee,* 8 R. I. 224 (1865).

[6] Cf. *Kurtz* v. *Moffitt,* 115 U. S. 487, 498–499 (1855).

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to make reasonable searches and seizures as incidents to lawful arrests.

In *Agnello* v. *United States*, 269 U. S. 20, 30 (1925), this Court stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime . . . as well as weapons and other things to effect an escape from custody, is not to be doubted. . . . Such searches and seizures naturally and usually appertain to and attend such arrests."[7] And see *Weeks* v. *United States*, 232 U. S. 383, 392 (1914); *Carroll* v. *United States*, *supra* at 158; *United States* v. *Lee*, 274 U. S. 559, 563 (1927); *Marron* v. *United States*, 275 U. S. 192, 198–199 (1927); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris* v. *United States*, 331 U. S. 145, 150–151, 168, 186 (1947).

The validity of a search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. Here there can be no objection to the scope or intensity of the search. Cf. *Marron* v. *United States*, *supra*; *Go-Bart Importing Co.* v. *United States*, *supra*; *United States* v. *Lefkowitz*, *supra*; *Harris* v. *United States*, *supra*. The seizure was not preceded by an exploratory search. The objects seized were in plain sight. To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which

[7] And see *id.* at 32, 33.

the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties.

In reaching its result the Court relies on *Taylor* v. *United States,* 286 U. S. 1 (1932). There, federal agents broke into a garage and seized a quantity of illicit liquor. At the time of entry, "No one was within the place and there was no reason to think otherwise." *Id.* at 5. The agents acted without the authority of a search warrant, nor, unlike the present case, was lawful entry into the building made for the purpose of effecting a valid arrest. Under these circumstances the Court ruled that the seizure was unlawful. But to apply that holding in a situation like the present, where law-enforcement officers have entered a building to arrest a party openly engaged in the commission of a felony, is to disregard the very basis upon which the *Taylor* case was decided.

We are told, however, that although the petitioner Antoniole was arrested while undeniably engaged in the commission of a felony, his presence in the building in which the contraband materials were located was a "fortuitous circumstance which was inadequate to legalize the seizure." We should suppose that any arrest of a party engaged in the commission of a felony is based in part upon an element of chance. Criminals do not normally choose to engage in felonious enterprises before an audience of police officials. We may well anticipate the perplexity of officers engaged in the practical business of law enforcement when confronted with a rule which makes the validity of a seizure of contraband materials as an incident to a lawful arrest dependent upon subsequent judicial judgment as to the "fortuitous" circumstances relating to the presence of the party arrested on the premises in which the illegal goods are located.

Nor are we free to assume that the agents in this case would have proceeded illegally to seize the materials in the barn in the absence of the justification of a valid arrest. A lawful seizure is not to be invalidated by speculations as to what the conduct of the agents might have been had a different factual situation been presented.

The case of *Johnson* v. *United States,* 333 U. S. 10 (1948), does not support the result which the Court has reached. For there the majority of the Court held that the arrest in question was an invalid one. Obviously, a search and seizure may not be held valid on the sole ground that it was an incident to an invalid arrest. Such is not the situation here.

In *Carroll* v. *United States, supra* at 149, this Court observed: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." We believe that the result reached today is not consistent with judicial authority as it existed before the adoption of the Fourth Amendment nor as it has developed since that time. Nor do we feel that the decision commends itself as adapted to conserve vital public and individual interests. Heretofore it has been thought that where officers charged with the responsibility of enforcement of the law have lawfully entered premises and executed a valid arrest, a reasonable accommodation of the interests of society and the individual permits such officials to seize instrumentalities of the crime and contraband materials in open view of the arresting officer. The Court would now condition this right of seizure after a valid arrest upon an *ex post facto* judicial judgment of whether the arresting officers might have obtained a search warrant. At best, the operation of the rule which the Court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities.

WEST v. OKLAHOMA TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 489. Argued March 29–30, 1948.—Decided June 14, 1948.

1. An Oklahoma inheritance tax on the transfer of properties held in trust by the United States for the benefit of a restricted Osage Indian and his heirs, which properties had not been exempted by Congress from direct taxation, *held* valid. Pp. 718–728.
2. *United States* v. *Rickert,* 188 U. S. 432, and *McCurdy* v. *United States,* 264 U. S. 484, distinguished; *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, followed. Pp. 724–727.
3. For the purpose of an estate tax, there is no substantial difference between restricted property and trust property. P. 726.
4. An inheritance or estate tax is not imposed upon the property of which an estate is composed, but rather upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. P. 727.
5. Whether legal title to the properties composing an estate is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer; nor is the fact that permitting the imposition of the inheritance tax on the transfer may deplete the trust corpus and create lien difficulties. P. 727.

200 Okla. —, 193 P. 2d 1017, affirmed.

From an order of the Oklahoma Tax Commission imposing an inheritance tax on the estate of a restricted Osage Indian, appellant, sole heir of the decedent, appealed. The state supreme court affirmed the order. 200 Okla. —, 193 P. 2d 1017. On appeal to this Court, *affirmed,* p. 728.

Frank T. McCoy argued the cause for appellant. With him on the brief were *John R. Pearson* and *Frank Mahan.*

R. F. Barry and *Joe M. Whitaker* argued the cause for appellee. With them on the brief was *C. W. King.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This appeal concerns the power of the State of Oklahoma to levy an inheritance tax on the estate of a restricted Osage Indian. Specifically, the problem is whether property held in trust by the United States for the benefit of the Indian may be included within the taxable estate.

Charles West, Jr., was a restricted, full-blood, unallotted, adult Osage Indian. He died intestate in 1940, a resident of Oklahoma. No certificate of competency was ever issued to him. Surviving him was his mother, appellant herein, who is a restricted, full-blood Osage Indian. The entire estate passed to her as the sole heir at law.[1]

The Oklahoma Tax Commission entered an order levying a tax on the transfer of the net estate, valued at $111,219.18. With penalties, the total tax imposed was $5,313.35. Appellant made timely objection to the inclusion of certain items in the taxable estate. These items formed the bulk of the estate and had been held in trust for the decedent by the United States, acting through the Secretary of the Interior. Act of June 28, 1906, 34 Stat. 539, as amended, 41 Stat. 1249, 45 Stat. 1478, 52 Stat. 1034. The trust properties involved were as follows:

(1) One and 915/2520ths Osage mineral headrights. This item represented the decedent's undivided interest in the oil, gas, coal and other minerals under the lands in Osage County, Oklahoma, said minerals having been

[1] The decedent was also survived by a widow. But she was prohibited by law from inheriting any part of the estate unless she was of Indian blood, a matter which was in dispute. A settlement was reached whereby the widow received a certain amount from the estate, apparently in return for giving up her claim as an heir.

reserved to the use of the Osage Tribe by the Act of June 28, 1906.[2]

(2) Surplus funds in the United States Treasury, representing accruals of income to the decedent from the headrights.

(3) Stocks and bonds purchased by and in the name of the United States and held for the decedent by the Secretary of the Interior. These purchases were made with the surplus funds accruing from the headrights.

(4) Trust funds in the hands of the Treasurer of the United States, representing decedent's share of the proceeds of the sale of the Osage Tribe's lands in Kansas.

(5) Personal property purchased with surplus funds.

Appellant claimed that these properties were immune from state taxation by virtue of the relevant provisions of the Constitution, treaties and laws of the United States; hence the Oklahoma Inheritance and Transfer Tax Act of 1939 (§§ 989–989t, Title 68, Okla. Stat. 1941) which authorized the assessment on the properties was invalid in this respect. The Oklahoma Tax Commission rejected this contention and the Supreme Court of Oklahoma affirmed. 200 Okla. —, 193 P. 2d 1017.

It is essential at the outset to understand the history and nature of the arrangement whereby the United States

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[2] An Osage headright has been defined by one court as "the interest that a member of the tribe has in the Osage tribal trust estate, and the trust consists of the oil, gas, and mineral rights, and the funds which were placed to the credit of the Osage tribe, all fully set out in the above act [Act of June 28, 1906, 34 Stat. 539]." *In re Denison*, 38 F. 2d 662, 664. Another court has made this definition: "The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates and the interest on the trust funds, is an Osage headright." *Globe Indemnity Co.* v. *Bruce*, 81 F. 2d 143, 148–149. Headrights are not transferable and do not pass to a trustee in bankruptcy. *Taylor* v. *Tayrien*, 51 F. 2d 884; *Taylor* v. *Jones*, 51 F. 2d 892.

holds in trust the properties involved in this case. See Cohen, Handbook of Federal Indian Law (1945) 446–455. In 1866, the United States and the Cherokee Nation of Indians executed a comprehensive treaty covering their various relationships. 14 Stat. 799. It was there agreed that the United States might settle friendly Indians in certain areas of Cherokee territory, including what is now Osage County, Oklahoma; these areas had previously been conveyed by the United States to the Cherokees. The treaty further provided that the areas in question were to be conveyed in fee simple to the tribes settled by the United States "to be held in common or by their members in severalty as the United States may decide."

The Osage Indians subsequently moved to the Indian Territory and settled in what is now Osage County. In 1883, pursuant to the 1866 treaty, the Cherokees conveyed this area to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians." It is significant that fee simple title to the land was not conveyed at this time to the Osages; instead, the United States received that title as trustee for the Osages. Nor was any distinction here made between the land and the minerals thereunder, legal title to both being transferred to the United States.

On June 28, 1906, the Osage Allotment Act, providing for the distribution of Osage lands and properties, became effective. 34 Stat. 539. See *Levindale Lead Co.* v. *Coleman,* 241 U. S. 432. Provision was there made for the allotment to each tribal member of a 160-acre homestead, plus certain additional surplus lands. These allotted lands, said § 7, were to be set aside "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided." The homestead was to be inalienable and nontaxable for 25 years or during the life of the allottee. The surplus lands, however, were to be inalienable for 25 years and nontax-

able for 3 years, except that the Secretary of the Interior might issue a certificate of competence to an adult, authorizing him to sell all of his surplus lands; upon the issuance of such a certificate, or upon the death of the allottee, the surplus lands were to become immediately taxable. § 2, Seventh; *Choteau* v. *Burnet*, 283 U. S. 691.

Section 3 of the Act stated that the minerals covered by these lands were to be reserved to the Osage Tribe for a period of 25 years and that mineral leases and royalties were to be approved by the United States. Section 4 then provided that all money due or to become due to the tribe was to be held in trust by the United States for 25 years;[3] but these funds were to be segregated and credited pro rata to the individual members or their heirs, with interest accruing and being payable quarterly to the members. Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the tribal members and distributed to the individual members in the same manner and at the same time as interest payments on other moneys held in trust. In this connection, it should be noted that quarterly payments of interest and royalties became so large that Congress later limited the amount of payments that could be made to those without certificates of competence; provision was also made for investing the surplus in bonds, stocks, etc.[4]

According to § 5 of this 1906 statute, at the end of the 25-year trust period "the lands, mineral interests, and

[3] The trust under which these funds were to be held was established in 1865 by treaty between the United States and the Great and Little Osage Indians, 14 Stat. 687. By the terms of this treaty, the proceeds of the sale of Osage lands in Kansas were to be placed in the United States Treasury to the credit of the tribe. Provisions for carrying out the terms of this treaty were made by Congress in 1880, 21 Stat. 291.

[4] By the Act of March 3, 1921, 41 Stat. 1249, Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000

moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the role herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided." It was also stated in § 2, Seventh, that the minerals upon the allotted lands "shall become the property of the individual owner of said land" at the expiration of 25 years, unless otherwise provided by Congress.

Moreover, § 6 provided that the lands, moneys and mineral interests of any deceased member of the Osage Tribe "shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma." Congress subsequently provided, in § 8 of the Act of April 18, 1912, 37 Stat. 86, 88, that any adult member of the tribe who was not mentally incompetent could by will dispose of "any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed," in accordance with the laws of the State of Oklahoma. Such wills could not be probated, however, unless approved by the Secretary of the Interior before the death of the testator.

The 25-year trust period established by the 1906 statute has been extended several times by Congress, first to 1946 (41 Stat. 1249), then to 1958 (45 Stat. 1478), and finally to 1984 (52 Stat. 1034). The last extension pro-

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quarterly. See also Act of Feb. 27, 1925, 43 Stat. 1008. In the Act of June 24, 1938, 52 Stat. 1034, it was provided that where the restricted Osage had surplus funds in excess of $10,000 he was to be paid $1,000 quarterly, but if he had surplus funds of less than $10,000 he was to receive quarterly only his current income, not to exceed $1,000 quarterly.

vided that the "lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

Application of the foregoing provisions to the estate in issue produces this picture: Legal title to the mineral interests, the funds and the securities constituting the corpus of the trust estate is in the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the beneficiary has no control over the corpus. See *Globe Indemnity Co.* v. *Bruce,* 81 F. 2d 143, 150.

Since 1819, when *McCulloch* v. *Maryland,* 4 Wheat. 316, was decided, it has been established that the property of the United States is immune from any form of state taxation, unless Congress expressly consents to the imposition of such liability. *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *United States* v. *Allegheny County,* 322 U. S. 174. This tax immunity grows out of the supremacy of the Federal Government and the necessity that it be able to deal with its own property free from any interference or embarrassment that state taxation might impose. *McCulloch* v.

Maryland, supra; Wisconsin Railroad Co. v. *Price County,* 133 U. S. 496.

In *United States* v. *Rickert,* 188 U. S. 432, the same rule was held to apply where the United States holds legal title to land in trust for an Indian or a tribe. The United States there held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. To tax these lands and the improvements thereon, without congressional consent, would be to tax a means employed by the Government to accomplish beneficent objects relative to a dependent class of individuals. Moreover, the United States had agreed to convey the lands to the allottees in fee at the end of the trust period "free of all charge or incumbrances whatsoever." If the tax in question were assessed and unpaid, the lands could be sold by the tax authorities. The United States would thus be so burdened that it could not discharge its obligation to convey unencumbered land without paying the taxes imposed from year to year.

Further application of the tax immunity rule to land held in trust by the United States for the benefit of Indians was made in *McCurdy* v. *United States,* 264 U. S. 484. That case involved surplus lands that had been allotted to members of the Osage Tribe. It will be recalled that the Osage Allotment Act of June 28, 1906, had made these surplus lands expressly taxable after three years or at the death of the allottee. The allottees in the *McCurdy* case died within the three-year period but before deeds to their allotted lands had been executed and delivered to them. Oklahoma sought to place a tax on the lands, the taxable date being within the three-year period and before the execution and delivery of the deeds to the

heirs of the allottees. This Court held that legal title to the lands in issue was still in the United States as trustee on the taxable date, title not passing until the execution and delivery of the deeds. In reliance on the *Rickert* case, the conclusion was reached that the lands were not taxable while held in trust by the United States. See also *United States* v. *Board of Comm'rs of Fremont County, Wyo.*, 145 F. 2d 329; *United States* v. *Thurston County*, 143 F. 287.

Since the property here involved is all held in trust by the United States for the benefit of the decedent and his heirs, it is thought to be immune from any form of state taxation under the decisions in the *Rickert* and *McCurdy* cases. Reference is made to certain provisions of the Oklahoma Inheritance and Transfer Tax Act which indicate that the inheritance tax in issue might have a very real and direct effect upon the property to which the United States holds title, an effect similar to that which was emphasized in the *Rickert* case. The Act applies, of course, to the transfer of estates held in trust. § 989. Specific provision is then made in § 989*i* that "Taxes levied under this Act shall be and remain a lien upon all the property transferred until paid." Provision is also made for the sale of estate property if necessary to satisfy the tax. §§ 989*i* and 989*l*. It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien.

Moreover, insofar as the inheritance tax is paid out of the surplus and trust funds held by the United States, there is a depletion of the corpus to which the United States holds legal title. Such depletion makes that much smaller the estate which the Government has seen fit to

hold in trust for the decedent's heirs. If the estate is to be tapped repeatedly by Oklahoma until 1984 by the deaths of the various heirs, the result may be a substantial decrease in the amount then available for distribution.

But our decision in *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, has foreclosed an application of the *Rickert* and *McCurdy* cases to the estate and inheritance tax situation. Among the properties involved in the *Oklahoma Tax Commission* case were restricted cash and securities, which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. We held that the restriction, without more, was not the equivalent of a congressional grant of estate tax immunity for the transfer of the cash and securities. Moreover, express repudiation was made of the concept that these restricted properties were federal instrumentalities and therefore constitutionally exempt from estate tax consequences. See also *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376. The very foundation upon which the *Rickert* case rested was thus held to be inapplicable.

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. *Board of Commissioners* v. *Seber,* 318 U. S. 705, 717; *United States* v. *Ramsey,* 271 U. S. 467, 471. Both devices have the common purpose of protecting those who have been found by Congress to be unable yet to assume a fully independent status relative to property. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax. The fact that the United States holds legal title as to trust property but not as to restricted property affords no distinguishing characteristic from the standpoint of an estate tax. In addition, Con-

gress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties. Hence the *Oklahoma Tax Commission* case must control our disposition of this proceeding.

Implicit in this Court's refusal to apply the *Rickert* doctrine to an estate or inheritance tax situation is a recognition that such a tax rests upon a basis different from that underlying a property tax. An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co.* v. *Helvering,* 307 U. S. 57, 60; *Whitney* v. *Tax Commission,* 309 U. S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot

be included in the estate for inheritance tax purposes. No such properties are here involved, however.

We have considered the other points raised by the appellant but deem them to be without merit. The judgment below is therefore

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent.

GRYGER *v.* BURKE, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 541. Argued April 26–27, 1948.—Decided June 14, 1948.

Petitioner was charged and convicted in a state court of Pennsylvania of being a fourth offender and sentenced to life imprisonment. In the proceeding on the fourth-offender charge, the only question of fact before the court was whether he was the same person who was convicted in four previous cases, and this he admitted and does not now deny. *Held:*

1. It is for the Pennsylvania courts to say whether the sentencing judge made an error in construing the Pennsylvania Habitual Criminal Act as making a life sentence mandatory and not discretionary; and an error by a state court in construing state law is not a denial of due process under the Federal Constitution. P. 731.

2. In the circumstances disclosed by the record in this case, the State's failure to provide counsel for petitioner on his plea to the fourth-offender charge was not a denial of due process. *Bute* v. *Illinois,* 333 U. S. 640. P. 731.

3. The fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Pennsylvania Habitual Criminal Act was passed does not make the Act invalidly retroactive or subject the petitioner to double jeopardy. P. 732.

Affirmed.

Certiorari, 332 U. S. 854, to review denial of writ of habeas corpus. *Affirmed,* p. 732.

Archibald Cox argued the cause and filed a brief for petitioner.

Franklin E. Barr argued the cause for respondent. With him on the brief was *John H. Maurer.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Commonwealth of Pennsylvania holds the petitioner prisoner under a life sentence as an habitual criminal. His claim here, protesting denial by the State Supreme Court of his petition for a writ of *habeas corpus,* is that the Federal Constitution requires Pennsylvania to release him on due process of law grounds because (1) he was sentenced as a fourth offender without counsel or offer of counsel; (2) one of the convictions on which the sentence is based occurred before the enactment of the Pennsylvania Habitual Criminal Act[1] and the statute is therefore unconstitutionally retroactive and *ex post facto;* and (3) sentencing under this Act unconstitutionally subjects him to double jeopardy.

At the outset, we face the suggestion that the case cannot properly be decided on the merits by this Court because, as a matter of state law, the attack on the life sentence may be premature since petitioner would be validly restrained on prior sentences not expiring until at least February 1949, even if the life sentence were to be invalidated. Some members of the Court prefer to affirm the judgment on that ground. However, since the state law question is not free from difficulty, the issue was not fully litigated in this Court, and since, on the merits,[2] the same conclusion is reached, we dispose of the case in that manner.

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[1] § 1108 of the Penal Code of 1939, 18 Pa. Stat. Ann. § 5108.

[2] Respondent contested the case below and in this Court on the merits. We assume that the Supreme Court of Pennsylvania passed

Beginning in 1927, at the age of seventeen, this petitioner has been arrested eight times for crimes of violence, followed in each instance by plea of guilty or by conviction. Respondent states, and petitioner does not deny, that of the last 20 years of his life, over 13 years have been spent in jail. A schedule of his pleas or convictions and pertinent data is appended, *post*, p. 732, those in italics being the four on the basis of which an information was filed charging him to be a fourth offender. Brought into court on that limited charge, he acknowledged his identity as the convict in each of the previous cases and he was given a life sentence pursuant to the Act. He was without counsel and it is said that he was neither advised of his right to obtain counsel nor was counsel offered to him.[3]

It rather overstrains our credulity to believe that one who had been a defendant eight times and for whom counsel had twice waged defenses, albeit unsuccessful ones, did not know of his right to engage counsel. No request to do so appears. The only question of fact before the court on the fourth offender charge was whether he was the same person who was convicted in the four cases. This he then admitted and does not now deny. The only other question was sentence, and it does not appear that any information helpful to petitioner was unknown to the court.

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on petitioner's allegations of deprivation of federal constitutional rights and that those issues are therefore open here. *Herndon* v. *Lowry*, 301 U. S. 242, 247.

[3] The Supreme Court of Pennsylvania has frequently held that the state constitutional provision according defendants the right to be heard by counsel does not require appointment of counsel in non-capital cases. See, for example, *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 24 A. 2d 1; *Commonwealth ex rel. Withers* v. *Ashe*, 350 Pa. 493, 39 A. 2d 610. See also *Betts* v. *Brady*, 316 U. S. 455, 465. The Pennsylvania statutes require only that destitute defendants accused of murder shall be assigned counsel. Act of March 22, 1907, 19 Pa. Stat. Ann. § 784.

It is said that the sentencing judge prejudiced the defendant by a mistake in construing the Pennsylvania Habitual Criminal Act in that he regarded as mandatory a sentence which is discretionary. It is neither clear that the sentencing court so construed the statute, nor if he did that we are empowered to pronounce it an error of Pennsylvania law. It is clear that the trial court, in view of defendant's long criminal record, considered he had a duty to impose the life sentence and referred to it as one "required by the Act." But there is nothing to indicate that he felt constrained to impose the penalty except as the facts before him warranted it. And it in any event is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

We have just considered at length the obligation of the States to provide counsel to defendants who plead guilty to non-capital offenses. *Bute* v. *Illinois,* 333 U. S. 640. Notwithstanding the resourceful argument of assigned counsel in this Court, we think that precedent settles the issue here, that no exceptional circumstances are present and that, under the circumstances disclosed by the record before us, the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid.

Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Cf. *Moore* v. *Missouri,* 159 U. S. 673; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Graham* v. *West Virginia,* 224 U. S. 616; *Carlesi* v. *New York,* 233 U. S. 51; *Pennsylvania ex rel. Sullivan* v. *Ashe,* 302 U. S. 51.

The judgment is

Affirmed.

Table of Pleas and Convictions.

Date	Charge	Plea	Sentence
1927	*Burglary*	*Guilty*	*1 year.*
1928	Assault and battery; carrying concealed deadly weapon.	Guilty	1 year.
1929	*Burglary; breaking and entering with intent to commit a felony.*	*Not guilty*	*Committed to Reformatory indefinitely.*
1930	*Armed robbery, armed assault, entering with intent to rob.*	*Guilty*	*5 to 10 years.*
1937	Burglary, carrying concealed deadly weapon.	Guilty of receiving stolen goods, and carrying concealed deadly weapon.	1½ to 3 years.
1943	Burglary, receiving stolen goods—12 offenses each.	Guilty of receiving stolen goods.	5 to 10 years.
1944	*Burglary*	*Not guilty*	*5 to 10 years.*
1944	Aggravated assault and battery.	Not guilty	Suspended.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, dissenting.

Even upon the narrow view to which a majority of this Court adhere concerning the scope of the right to counsel

in criminal cases, as guaranteed by the Fourteenth Amendment's requirement of due process of law, I cannot square the decision in this case with that made in *Townsend* v. *Burke, post,* p. 736, decided today.

The opinion in that case declares that "the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process." In this view the Court finds that Townsend was prejudiced by the trial court's action in sentencing him on the basis either of misinformation submitted to it concerning his prior criminal record or by its misreading of the record and carelessness in that respect. On the same basis Gryger's sentence was invalid, although the Court finds no such exceptional circumstances here inducing prejudice as it finds in Townsend's case.

The record, in my judgment, does reveal such a circumstance, one working to induce prejudice at exactly the same point as with Townsend, namely, upon the critical question of sentence. So far as the record reveals, Gryger was sentenced to life imprisonment by a court working under the misconception that a life term was mandatory, not discretionary, under the Pennsylvania Habitual Criminal Act.[1]

Exactly the opposite is true. In explicit terms the statute puts imposition of life imprisonment upon fourth offenders "in the discretion of the judge." [2] Moreover,

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[1] Pa. Stat. Ann. tit. 18, § 5108.

[2] Section 5108 (b) provides that when the prior convictions are shown at the trial for the fourth offense, the defendant "shall, upon conviction . . . be sentenced, in the discretion of the judge trying the case, to imprisonment in a state penitentiary for the term of his natural life."

Section 5108 (d), which authorizes the procedure followed in the instant case, *viz,* a separate proceeding on an information within

appeal of the sentence is authorized "not only as to alleged legal errors but also as to the justice thereof," with the costs of appeal and reasonable counsel fee to be paid by the Commonwealth.[3]

In spite of his discretion and duty to exercise it, the sentencing judge, remarking that the only question was whether petitioner was the same person who had suffered the prior convictions, repeatedly spoke as if the life sentence were mandatory. The statements quoted in the margin are typical.[4]

It is immaterial that the same sentence might or probably would have been imposed in an exercise of the court's discretion. Petitioner was entitled to have sentence pronounced in that manner, not as an automatic mandate of statute. The denial of the very essence of the judicial process, which is the exercise of discretion where discretion is required, is in itself a denial of due process, not merely an error of state law of no concern to this Court. And we cannot speculate whether the same sentence would have been pronounced if the court's discretion had been exercised.

Moreover, the court's misconception, together with the absence of counsel, deprived the petitioner of any chance

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two years of the fourth conviction, provides that "the court may sentence him to imprisonment for life as prescribed in clause (b) of this section . . . ."

That the statute vests discretion in the sentencing judge has been clearly recognized by the Commonwealth's highest court. *Commonwealth ex rel. Foster* v. *Ashe*, 336 Pa. 238, 240.

[3] § 5108 (d).

[4] ". . . it becomes my duty, under the Act of Assembly, to treat such a case, that is to say, where a person has been found guilty the fourth time of a felony within a prescribed period, to impose the sentence required by the Act."

"In other words, the law has come to this viewpoint: . . . [a fourth offender] must be removed from the possibility of ever committing the offense again."

to be heard on the crucial question of sentence, the only matter left for hearing and the vital one after his plea of guilty was received. Even if it could be assumed, as the Court says, that he knew of his right to counsel from his frequent prior appearances in court,[5] still it cannot be assumed, indeed the record substantially disproves, that he knew the exact terms of the Habitual Criminal Act.[6] He therefore, misled it would seem by the court's language giving no hint of its discretionary power, made no plea in mitigation and had no representative to correct the court's misconception or to present considerations which might have induced a sentence less severe than the one pronounced. To paraphrase the concluding sentence of the opinion in the *Townsend* case, "Counsel might not have changed the sentence, but he could have taken steps to

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[5] A dubious assumption, it would seem, in view of the fact that Pennsylvania generally confines the right to have counsel in criminal trials to capital cases. See, *e. g., Commonwealth ex rel. McGlinn* v. *Smith,* 344 Pa. 41; *Commonwealth ex rel. Withers* v. *Ashe,* 350 Pa. 493. Pa. Stat. Ann. tit. 19, § 784. But cf. note 3 and text.

[6] Petitioner, when served with the information charging him as a fourth offender, was confined in the penitentiary without financial means of preparing a defense. He alleged, without contradiction, that the prison authorities refused his request for a copy of the Habitual Criminal Act. It is no answer, of course, to say that petitioner had no need of the statute or other assistance because of his previous trips through the courts. Whatever knowledge of court procedures he may have acquired, he was unfamiliar with the fourth offender act.

Even if petitioner had secured access prior to the hearing to materials needed to prepare a defense, or had been adequately informed by the court as to the statute's terms and his rights thereunder, it is highly unrealistic to assume that petitioner was capable of adequately presenting his own case at the hearing. The pleadings which he filed are telling witness of his limited intelligence and education. And at the hearing it was so obvious that petitioner was unable to comprehend the issues involved that the assistant district attorney representing the Commonwealth remarked, "He doesn't understand."

see that the sentence was not predicated on misconception or misreading of the controlling statute, a requirement of fair play which absence of counsel withheld from this prisoner."

I find it difficult to comprehend that the court's misreading or misinformation concerning the facts of record vital to the proper exercise of the sentencing function is prejudicial and deprives the defendant of due process of law, but its misreading or misconception of the controlling statute, in a matter so vital as imposing mandatory sentence or exercising discretion concerning it, has no such effect. Perhaps the difference serves only to illustrate how capricious are the results when the right to counsel is made to depend not upon the mandate of the Constitution, but upon the vagaries of whether judges, the same or different, will regard this incident or that in the course of particular criminal proceedings as prejudicial.

TOWNSEND *v.* BURKE, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 542. Argued April 27, 1948.—Decided June 14, 1948.

1. That a defendant convicted in a state court of a non-capital offense on a plea of guilty had been held incommunicado for a period of 40 hours between his arrest and his plea of guilty, has no bearing on the validity of his conviction—particularly when he makes no allegation that the circumstances of his detention induced his plea of guilty. Pp. 737–738.
2. Where a defendant so convicted was not represented by counsel and it appears from the record that, while the court was considering the sentence to be imposed, the defendant actually was prejudiced either by the prosecution's submission of misinformation regarding his prior criminal record or by the court's careless misreading of that record, he was denied due process of law and the conviction cannot be sustained. Pp. 738–741.

Reversed.

Certiorari, 332 U. S. 854, to review denial of writ of habeas corpus by the Supreme Court of Pennsylvania. *Reversed*, p. 741.

Archibald Cox argued the cause and filed a brief for petitioner.

Franklin E. Barr argued the cause for respondent. With him on the brief was *John H. Maurer.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Commonwealth of Pennsylvania holds petitioner prisoner under two indeterminate sentences, not exceeding 10 to 20 years, upon a plea of guilty to burglary and robbery. On review here of the State Supreme Court's denial of *habeas corpus*,[1] the prisoner demands a discharge by this Court on federal constitutional grounds.

Petitioner, while a fugitive, was indicted on June 1, 1945, for burglary and armed robbery. Four of his alleged accomplices had been arrested on May 18, 1945, and signed a joint confession, while a fifth had been arrested on May 21, 1945, and had also confessed. Petitioner was arrested on June 3, 1945, and confessed on June 4. On June 5, after pleading guilty to two charges of robbery and two charges of burglary and not guilty to other charges, he was sentenced.

Petitioner now alleges violation of his constitutional rights in that, except for a ten-minute conversation with his wife, he was held incommunicado for a period of 40

[1] Respondent raised no procedural or jurisdictional issues in this Court or in the State Supreme Court. Since petitioner has throughout based his claim for relief solely on alleged deprivation of federal constitutional rights, we assume that those questions were considered by the Supreme Court of Pennsylvania and are therefore open here. *Herndon* v. *Lowry*, 301 U. S. 242, 247.

hours between his arrest and his plea of guilty. He does not allege that he was beaten, misused, threatened or intimidated, but only that he was held for that period and was several times interrogated. He does not allege that the questioning was continuous or that it had any coercive effect.

The plea for relief because he was detained, as he claims, unlawfully is based on *McNabb* v. *United States,* 318 U. S. 332. But the rule there applied was one against use of confessions obtained during illegal detention and it was limited to federal courts, to which it was applied by virtue of our supervisory power. In this present case no confession was used because the plea of guilty in open court dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it induced the plea.

Petitioner also relies on *Haley* v. *Ohio,* 332 U. S. 596, in which this Court reversed a state court murder conviction because it was believed to have been based on a confession wrung from an uncounseled 15-year-old boy held incommunicado during questioning by relays of police for several hours late at night. Even aside from the differing facts, that case provides no precedent for relief to this prisoner since, as has been said, no confession was used against him, and he does not allege that his pleas of guilty resulted from his allegedly illegal detention.

Petitioner also says that when he was brought into court to plead, he was not represented by counsel, offered assignment of counsel, advised of his right to counsel or instructed with particularity as to the nature of the crimes with which he was charged. This, he says, under the circumstances deprived his conviction and sentence

of constitutional validity by reason of the due process clause of the Fourteenth Amendment.[2]

Only recently a majority of this Court reaffirmed that the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital case from an uncounseled defendant. *Bute* v. *Illinois,* 333 U. S. 640. In that, and in earlier cases, we have indicated, however, that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process.

The proceedings as to this petitioner, following his plea of guilty, consisted of a recital by an officer of details of the crimes to which petitioner and others had pleaded guilty and of the following action by the court (italics supplied):

> "By the Court (addressing Townsend):
> "Q. Townsend, how old are you?
> "A. 29.
> "Q. You have been here before, haven't you?
> "A. Yes, sir.
> "Q. *1933, larceny of automobile.* 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. *1938, entering to steal and larceny in Doylestown.* Were you tried up there? No, no. Arrested in Doylestown. That was up on Ger-

[2] The Supreme Court of Pennsylvania has frequently held that the state constitutional provision according defendants the right to be heard by counsel does not require appointment of counsel in non-capital cases. See, for example, *Commonwealth ex rel. McGlinn* v. *Smith,* 344 Pa. 41, 24 A. 2d 1; *Commonwealth ex rel. Withers* v. *Ashe,* 350 Pa. 493, 39 A. 2d 610. See also *Betts* v. *Brady,* 316 U. S. 455, 465. The Pennsylvania statutes require only that destitute defendants accused of murder shall be assigned counsel. Act of March 22, 1907, 19 Pa. Stat. Ann. § 784.

mantown Avenue, wasn't it? You robbed a paint store.

"A. No. That was my brother.

"Q. You were tried for it, weren't you?

"A. Yes, but I was not guilty.

"Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother too?

"A. No.

"Q. *1937, receiving stolen goods, a saxophone.* What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

"The Court: Ten to twenty in the Penitentiary."

The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by

lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of *habeas corpus*. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE BURTON dissent.

LICHTER ET AL., DOING BUSINESS AS SOUTHERN FIREPROOFING CO., *v.* UNITED STATES.

NO. 105. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued November 20–21, 1947.—Decided June 14, 1948.

1. The Renegotiation Act is constitutional on its face as authority for the recovery by the United States of "excessive profits" (less tax credits) realized by private parties in the circumstances of these cases on subcontracts for war goods in time of war with contractors who were also private parties—even in the absence of contractual provisions for the renegotiation of such profits and even as applied to contracts entered into prior to the enactment of the Act, provided final payments had not been made pursuant to such contracts prior to the date of enactment of the original Act. Pp. 746, 753–793.
2. The power of Congress to authorize the recovery of such excessive profits is included in the broad scope of the war powers expressly granted to Congress by the Constitution. Pp. 753–772.

   (a) In time of war, Congress unquestionably has the fundamental power to conscript men and to requisition properties necessary and proper to enable it to raise and support armies. Pp. 756, 765.

   (b) The Renegotiation Act was a law "necessary and proper" for carrying into execution the war powers of Congress and especially its power to raise and support armies. Pp. 757–765.

   (c) Not only was it "necessary and proper" for Congress to provide for the production of war supplies in the successful conduct of the war, but it was well within the outer limits of the constitutional discretion of Congress and the President to do so under the terms of the Renegotiation Act in a manner designed to eliminate excessive private profits. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305. Pp. 763–765, 769.

   (d) The plan for renegotiation of profits realized by private parties on contracts for production of war goods—chosen by

*Together with No. 74, *Pownall et al.* v. *United States*, on certiorari to the Circuit Court of Appeals for the Ninth Circuit; and No. 95, *Alexander Wool Combing Co.* v. *United States*, on certiorari to the Circuit Court of Appeals for the First Circuit, argued November 21, 1947.

Congress as an alternative to mobilization of the productive capacity of the nation into a governmental unit on the totalitarian model—symbolized a free people united in reaching unequalled productive capacity and yet retaining the maximum of individual freedom consistent with a general mobilization of effort. Pp. 765–772.

3. The authority granted for administrative determination of the amount of "excessive profits," if any, realized on war subcontracts was a constitutional definition of administrative authority and not an unconstitutional delegation of legislative power. Pp. 774–787.

(a) A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes. Pp. 778–783.

(b) The administrative practices developed under the Act demonstrated the definitive adequacy of the term "excessive profits" as used in the Act. P. 783.

(c) In the light of the purpose of the Act and its factual background, the statutory term "excessive profits" was a sufficient expression of legislative policy and standards to render it constitutional. Pp. 783–786.

(d) The methods prescribed and the limitations imposed by Congress on the contemplated administrative action help to sustain its constitutionality. Pp. 786–787.

4. The war powers of Congress and the President are only those which are to be derived from the Constitution, but the primary implication of a war power is that it shall be an effective power to wage war successfully. P. 782.

5. While the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind. P. 782.

6. It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. P. 785.

7. The collection of renegotiated excessive profits on a war subcontract is not in the nature of a penalty and is not a deprivation of a subcontractor of his property without due process of law in violation of the Fifth Amendment. Pp. 787–788.

8. The Government was entitled to recover excessive profits (less tax credits) from each of the subcontractors in these cases, whether they arose from contracts made before or after the passage of the Act, provided final payments had not been made pursuant to such contracts prior to the date of the original Act—even though

they arose out of contracts between private parties and not out of contracts made directly with the Government itself. Pp. 747–753, 788–789.

9. In a suit by the Government under the Act to recover excessive profits administratively determined to have been realized by subcontractors under war contracts in the circumstances of these cases, subcontractors who failed to make timely application to the Tax Court for redetermination of the amount of such excessive profits do not have the right to raise questions as to the coverage of the Act, as to the amount of excessive profits adjudged to be due from them, or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition for a redetermination. Pp. 753–754, 789–793.

(a) The statute and the course of action taken afforded procedural due process to the subcontractors in these cases. P. 791.

(b) The statutory provision for a petition to the Tax Court was not, in any of these cases, an optional or alternative procedure; it provided the only procedure to secure a redetermination of the excessive profits which had been administratively determined to exist. P. 792.

(c) Failure of the subcontractors in these cases to exhaust that procedure has left them no right to present such issues in this Court. P. 792.

160 F. 2d 329; 159 F. 2d 73; 160 F. 2d 103, affirmed.

The cases are stated concisely in the opinion with citations to the decisions below, pp. 746–753. *Affirmed*, p. 793.

Paul W. Steer argued the cause and filed a brief for petitioners in No. 105.

Leo R. Friedman argued the cause for petitioners in No. 74. With him on the brief was *Jos. I. McMullen.*

Edward C. Park argued the cause and filed a brief for petitioner in No. 95.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Herbert A. Bergson, Newell A. Clapp, Paul A. Sweeney, Oscar H. Davis* and *Ellis Lyons.*

O. R. McGuire and *Julius C. Smith* filed a brief for the Spindale Mills, Inc., as *amicus curiae,* in Nos. 74 and 95, urging reversal.

MR. JUSTICE BURTON delivered the opinion of the Court.

The Renegotiation Act,[1] in time of crisis, presented to this nation a new legislative solution of a major phase

[1] The Renegotiation Act, including its amendments, is here treated as consisting of:

I. Section 403, Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245–246. Sometimes this is called the Original or First Renegotiation Act. For relevant excerpts from its text see Appendix I, *infra,* p. 793.

II. Title VIII, Renegotiation of War Contracts, Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982–985, 26 U. S. C. A. *Internal Revenue Acts Beginning 1940,* Revenue Act of 1942, § 801, p. 376. For relevant excerpts from its text see Appendix II, *infra,* p. 795.

III. Section 1, Military Appropriation Act, 1944, approved July 1, 1943, c. 185, 57 Stat. 347–348.

IV. An Act to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts, approved July 14, 1943, c. 239, 57 Stat. 564–565.

V. Title VII, Renegotiation of War Contracts, and Title VIII, Repricing of War Contracts, Revenue Act of 1943, passed notwithstanding the objections of the President, February 25, 1944, c. 63, 58 Stat. 21, 78–93, 50 U. S. C. (Supp. V, 1946) §§ 1191, 1192; also 26 U. S. C. A. *Internal Revenue Acts Beginning 1940,* Revenue Act of 1943, §§ 701 and 801, pp. 491 and 508. For relevant excerpts from its text see Appendix III, *infra,* p. 798. Sometimes this is called the Second Renegotiation Act. Section 701 (b), of the foregoing Chapter 63, added to § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, a final subsection as follows: "(l) This section may be cited as the 'Renegotiation Act'." 58 Stat. 90. Section 701 (d) also provided that this subsection (l) of § 403, and certain others, "shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment." 58 Stat. 92.

VI. An Act to extend through December 31, 1945, the termination date under the Renegotiation Act, approved June 30, 1945, c. 210, 59 Stat. 294–295, 50 U. S. C. (Supp. V, 1946) § 1191.

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of the problem of national defense against world-wide aggression. Through its contribution to our production program it sought to enable us to take the leading part in winning World War II on an unprecedented scale of total global warfare without abandoning our traditional faith in and reliance upon private enterprise and individual initiative devoted to the public welfare.

In each of the three cases before us the principal issue is the constitutionality, on its face, of the Renegotiation Act insofar as it is authority for the recovery of the excessive profits sought to be recovered by the United States from the respective petitioners. In each case the secondary issue is whether the failure of the respective petitioners to petition the Tax Court for a redetermination of the amount, if any, of their excessive profits excludes from consideration here the coverage of the Act, the amount of the profits and other comparable issues which could have been presented to the Tax Court. In each of these cases the District Court has held that the Act was constitutional and that, by failure to petition the Tax Court for their redetermination, the existing orders have become final as claimed by the Government. Each Circuit Court of Appeals has affirmed, unanimously, the judgment appealed to it. We agree with the courts below.

In each of these cases the United States obtained a judgment for a sum alleged to be owed to it pursuant to a determination of excessive profits under the Renegotiation Act. The determinations of excessive profits in the respective cases were made by the Under Secretary of War or by the War Contracts Price Adjustment Board after the Revenue Act of 1943 had been approved, February 25, 1944. That Act contained, in its Title VII, the so-called Second Renegotiation Act which included provisions for the filing with the Tax Court of petitions for the redeterminations of excess profits. None of these petitioners, however, filed such a petition with the Tax

Court. On the other hand, the respective petitioners have relied upon their claims that, as a matter of law, the Renegotiation Act is unconstitutional on its face insofar as it purports to authorize the judgments which have been taken against the respective petitioners. The petitioners contend also that their failures to file petitions with the Tax Court have not foreclosed their respective rights to contest here the coverage of the Act, the amount of the excess profits found against them and other comparable issues which they might have presented to the Tax Court.

NO. 105 (THE LICHTER CASE).

In May, 1945, the United States filed its complaint in the District Court of the United States for the Southern District of Ohio against the petitioners, Jacob Lichter and Jennie L. Lichter, engaged in the construction business in Cincinnati, Ohio, under the name of the Southern Fireproofing Company, a copartnership. The complaint was founded upon the determination by the Under Secretary of War, dated October 20, 1944, that $70,000 of the profits realized by petitioners during the calendar year 1942 from nine subcontracts, executed in 1942 for a total price of $710,224.16, were, under the Renegotiation Act, excessive profits. The complaint showed that the petitioners were entitled to a tax credit of $42,980.61 against such excessive profits. It alleged, moreover, that the petitioners had not, within the required period, petitioned the Tax Court for a redetermination of the order in question and had not paid or otherwise eliminated the amount of $27,019.39 thus due to the United States.

The petitioners admitted that the Under Secretary had made the determination as alleged; that if his order were valid the petitioners were entitled to the tax credit specified; and that they had not paid the sum demanded nor had they filed a petition with the Tax Court for a rede-

termination of the excessive profits, if any. They put in issue, on specifically stated grounds, the constitutionality of the Renegotiation Act insofar as it might be authority for the recovery of the profits sought to be recovered, and they put in issue the applicability to them of any requirement that they seek in the Tax Court a redetermination of the profits which they had been ordered to repay to the United States. They alleged also that: of the nine subcontracts which were made the basis of renegotiation, all were executed during the calendar year 1942; four were executed before April 28, 1942, the date of the original Renegotiation Act; none contained clauses permitting or requiring their renegotiation; only two of them were for amounts in excess of $100,000 each; these two were among those which had been executed before April 28, 1942; and no excessive profits had been in fact earned by the petitioners during 1942. Finally they alleged that the several contracts referred to were subcontracts entered into under prime contracts which had been awarded by a department of the Government as the result of competitive bidding for the construction of buildings and facilities and the subcontracts themselves had been obtained by petitioners after further competitive bidding. For these and other reasons stated in the answer the contracts were claimed to be exempt from renegotiation.

The United States moved for judgment on the pleadings and, in the alternative, for summary judgment. Affidavits were filed in support of those motions. These included particularly the comprehensive affidavits of Robert P. Patterson, then Under Secretary of War, and of H. Struve Hensel, then Assistant Secretary of the Navy. These affidavits set forth the general background of the Renegotiation Act and the basis for claiming that the renegotiation of war contracts was necessary in order to sustain this nation's share of the burden of winning World War II. Counterparts of these two affidavits were

filed in each of the other cases before us. The petitioners, on the other hand, moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted and that the profits in question were exempt from the Act.

The District Court made findings of fact substantially as stated in the complaint and admitted in the answer. It concluded that there was no genuine issue as to any material fact and that the United States was entitled to judgment as a matter of law for $27,019.39, with interest at six percent per annum from November 6, 1944. 68 F. Supp. 19. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment. It held expressly that the Renegotiation Act was valid on its face and that the petitioners, by reason of their failure to petition the Tax Court for a redetermination of the amount of the excessive profits, if any, were barred from making their other attacks on the Secretary's determination of such excessive profits. 160 F. 2d 329. Because of the basic significance of the constitutional questions involved we granted certiorari. 331 U. S. 802.

NO. 74 (THE POWNALL CASE).

In September, 1945, the United States filed its complaint in the District Court of the United States for the Southern District of California against the petitioners, A. V. Pownall, Grace M. Pownall, and Henes-Morgan Machinery Company, Limited, a California corporation, all three doing business in Los Angeles, California, as co-partners under the name of General Products Company. The record indicates that they were there engaged in the production of precision parts, machinery and tools for use by war contractors. The complaint was founded upon a determination made by the Under Secretary of War, on behalf of the War Contracts Price Adjustment Board, dated December 27, 1944, to the effect that $628,373.14 of

the profits realized by petitioners during the calendar year 1943 on their contracts and subcontracts, subject to renegotiation pursuant to the Renegotiation Act, were excessive profits. The complaint showed that the petitioners were entitled to a tax credit of $514,663.95 against such profits. It alleged, moreover, that the petitioners had not, within the required period, petitioned the Tax Court for a redetermination of the order in question and had not paid the sum of $113,709.19 thus claimed by the United States. The petitioners admitted that the Under Secretary had made the determination as alleged; that the Board had adopted his order; that the appropriate tax credit was as alleged; that no petition for redetermination had been filed with the Tax Court; that the time for filing had expired; and that no payment of the amount claimed had been made. The petitioners alleged, however, that the Renegotiation Act was invalid on its face on numerous specifically stated constitutional grounds; that the Under Secretary's order was invalid in that it was based on undisclosed data and contained no findings; and that no single contract under consideration exceeded in amount the sum of $99,000.

The United States moved for judgment on the pleadings and, in the alternative, for summary judgment. The petitioners did the same. Under the stipulations of the parties there were no disputed issues of fact and the only questions left for decision were those as to the constitutional validity of the Act and as to its interpretation if found to be valid.

The District Court denied the motions of both parties. However, ruling on the merits of the cause thus before it, it found the facts to be substantially as alleged in the complaint and as stipulated. It held the Act to be valid on its face and held the unappealed determination of excessive profits to be final. It rendered judgment for the United States for $121,043.39, evidently repre-

senting $113,709.19, with interest at six percent per annum from March 13, 1945. 65 F. Supp. 147, and see findings of fact, conclusions of law and judgment of the court. The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. It followed its earlier decision in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, in upholding the constitutionality of the Act and expressly holding that the petitioners, by not having petitioned the Tax Court for relief, had failed to exhaust their administrative remedies. Accordingly, it held that the District Court was without jurisdiction to consider the petitioners' contentions as to the coverage of the Act. 159 F. 2d 73. We granted certiorari. 331 U. S. 802.

NO. 95 (THE ALEXANDER CASE).

In August, 1945, the United States filed its complaint in the District Court of the United States for the District of Massachusetts against the petitioner, Alexander Wool Combing Company, a Massachusetts corporation doing business at Lowell, Massachusetts, and there engaged in the business of scouring wool and combing it into tops and noils for commissions paid to it by the owners of the wool. The complaint was founded upon two determinations by the Under Secretary of War, both dated September 6, 1944. One determined that $22,500 of the profits realized by the petitioner during its fiscal year ended June 30, 1942, and the other that $45,000 of the profits realized by the petitioner during its fiscal year ended June 30, 1943, under its contracts and subcontracts which were alleged to be subject to the provisions of the Renegotiation Act, were excessive. The complaint showed that the petitioner was entitled to a tax credit of $15,020.80 against such excessive profits for the fiscal year ended June 30, 1942, and of $36,596.42 against those for the fiscal year ended June 30, 1943. The complaint alleged, moreover, that the petitioner had not, within the

required periods, petitioned the Tax Court for a redetermination of either of the orders in question; that the respective periods for filing such petitions had expired; and that the petitioner had not paid, or otherwise eliminated, the amount of $15,882.78 thus due to the United States. The petitioner admitted the factual allegations of the complaint but denied that any amount was owing to the United States. It claimed that the determinations made by the Under Secretary were void because made without due process of law and were unenforcible as to the petitioner because, as applied to it, they were unconstitutional for several specifically stated reasons.

The United States moved for judgment on the pleadings or, in the alternative, for summary judgment. In support of these motions the above-mentioned affidavits of Robert P. Patterson, Under Secretary of War, and of H. Struve Hensel, Assistant Secretary of the Navy, and several others were filed. Evidence both oral and in affidavit form was submitted in opposition. The District Court stated in its opinion, 66 F. Supp. 389, 391, that the petitioner "had no direct contracts with any department or agency of the United States. It combed wool for different private companies. It knew that some of the wool it combed for the companies was destined for use in government contracts, but it was and is ignorant as to the destination of other wool." That court, nevertheless, rendered judgment in favor of the United States, for $15,882.78, with interest at six percent per annum from September 6, 1944. It held that the war powers of Congress were sufficient to enable it to authorize the recapture of excessive profits such as these; that the standard of "excessive profits" was sufficient to satisfy the constitutional limitations on the power of Congress to delegate authority; that any defects in the departmental proceedings were immaterial in view of the opportunity afforded the petitioner for a trial *de novo* and

for a redetermination of excessive profits, if any, in the Tax Court; and that petitioner's defenses on the ground of lack of coverage or of retroactivity of the application of the Renegotiation Act to the petitioner were lost to it by its failure to seek relief from the Tax Court. The Circuit Court of Appeals for the First Circuit said, *per curiam:* "We think the court below adequately covered all the issues in this case and we affirm its judgment upon the grounds and for the reasons set forth in its opinion . . . ." 160 F. 2d 103.[2] We granted certiorari. 331 U. S. 802.

THE BACKGROUND.

We have two main issues before us: (1) the constitutionality of the Renegotiation Act on its face and (2) the finality of the determination of the excessive profits made under it in the absence of a petition filed with the Tax Court within the required time, seeking a redetermination of those profits. In the *Lichter* case we have issues as to profits made in the calendar year 1942, in the *Pownall* case as to profits made in the calendar year 1943, and in the *Alexander* case as to certain profits made in the fiscal year ended June 30, 1942, and as to other profits made in the fiscal year ended June 30, 1943. In each case we uphold the constitutionality of the Act as providing the necessary authorization for the judgments rendered. We also accept the finality given by the courts below to the administrative determinations made of the excessive profits, although the statutory situ-

[2] In addition to the opinions of the Circuit Courts of Appeals and District Courts cited in the text, see *Ring Construction Corp.* v. *Secretary of War,* 8 T. C. 1070; *Cohen* v. *Secretary of War,* 7 T. C. 1002; *Stein Bros. Mfg. Co.* v. *Secretary of War,* 7 T. C. 863. For discussions of the Renegotiation Act by this Court, stopping short of passing upon its constitutionality, see *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; and *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540.

ation as a basis for the finality of such determinations is not precisely the same in each case. By reason of the finality thus attached to the determinations made as to excessive profits in these cases, we do not pass upon the issues attempted to be raised here as to the coverage of the Act, the amount of the profits, or other matters which the petitioners might have presented to the Tax Court but did not.

In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although resting on valid constitutional grounds, is capable of gross abuse. The very finality of the administrative determinations here upheld emphasizes the seriousness of the injustices which can result from the abuse of the large powers vested in the administrative officials. We do not minimize the seriousness of complaints which thus may be cut off without relief in the name of the necessities of war and for the sake of the defense of the nation when its survival is at stake. We re-emphasize that, under these conditions, there is great need both for adequate channels of procedural due process and for careful conformity to those channels. In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself. Within procedure thus authorized by the Constitution, the Congress and the Administration, and here affirmed, resulting injustices can and should be carefully examined and as far as possible relieved. In war both the raising and the support of the armed forces are essential. Both require mobilization and control under the authority of Congress. Both are entitled also to such postwar relief as may be authorized by Congress.

The Renegotiation Act was developed as a major wartime policy of Congress comparable to that of the Selective Service Act. The authority of Congress to authorize

each of them sprang from its war powers. Each was a part of a national policy adopted in time of crisis in the conduct of total global warfare by a nation dedicated to the preservation, practice and development of the maximum measure of individual freedom consistent with the unity of effort essential to success.

With the advent of such warfare, mobilized property in the form of equipment and supplies became as essential as mobilized manpower. Mobilization of effort extended not only to the uniformed armed services but to the entire population. Both Acts were a form of mobilization. The language of the Constitution authorizing such measures is broad rather than restrictive. It says "The Congress shall have Power . . . To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years; . . . ." Art. I, § 8, Cl. 12.[3] This places emphasis upon the supporting as well

[3] Among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war, the following obviously command attention: "We the People of the United States, in Order to form a more perfect Union, . . . provide for the common defence, . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U. S. Const. Preamble.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

. . . . . .

"To declare War, . . .

. . . . . .

"To provide and maintain a Navy;

. . . . . .

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, ..." *Id.* Art. I, § 8.

"The President shall be Commander in Chief of the Army and Navy of the United States, ..." *Id.* Art. II, § 2, Cl. 1.

Madison said in The Federalist, Number XLI,—General View of

as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied. The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits or any substitute for such conscription of them. For his hazardous, full-time service in the armed forces a soldier is paid whatever the Government deems to be a fair but modest compensation. Comparatively speaking, the manufacturer of war goods undergoes no such hazard to his personal safety as does a front-line soldier and yet the Renegotiation Act gives him far better assurance of a reasonable return for his wartime services than the Selective Service Act and all its related legislation give to the men in the armed forces. The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping.[4] It is valid, *a fortiori*.

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the Powers Conferred by the Constitution: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils."

Hamilton said in The Federalist, Number XXIII,—The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union:

"The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence."

[4] "The Constitution grants to Congress power 'to raise and support Armies,' 'to provide and maintain a Navy,' and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. *Selective Draft Law Cases*, 245 U. S. 366. Its power to draft business organizations

In view of this power "To raise and support Armies, . . ." and the power granted in the same Article of the Constitution "To make all Laws which shall

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to support the fighting men who risk their lives can be no less." *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305.

In writing of the power of Congress to pass a Conscription Act, President Lincoln said, with characteristic clearness:

"Whether a power can be implied when it is not expressed has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon of denying a power which is plainly and distinctly written down in the Constitution. The Constitution declares that 'The Congress shall have power . . . to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.' The whole scope of the conscription act is 'to raise and support armies.' There is nothing else in it. . . .

". . . Do you admit that the power is given to raise and support armies, and yet insist that by this act Congress has not exercised the power in a constitutional mode?—has not done the thing in the right way? Who is to judge of this? The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative. . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution, without an 'if.'" 9 Nicolay and Hay, Works of Abraham Lincoln 75–77 (1894).

The foregoing quotation is from an opinion by President Lincoln, which was not actually issued or published by him but which was quoted to the above extent by Honorable Charles Evans Hughes, of New York, in his address on "War Powers Under the Constitution" before the American Bar Association, September 5, 1917, 42 A. B. A. Rep. 232, 234–235.

The draft was put in force both by the Union and by the Confederacy during the Civil War and its validity was sustained by the courts in both North and South. "The power of coercing the citizen to render military service, is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation." *Burroughs* v. *Peyton*, 16

be necessary and proper for carrying into Execution the foregoing Powers, . . ." the only question remaining is whether the Renegotiation Act was a law "necessary and proper for carrying into Execution" the war powers of Congress and especially its power to support armies.

It is impossible here to picture adequately all that might have been "necessary and proper" in 1942–1944 to meet the unprecedented responsibility facing Congress in this field. We do, however, catch a glimpse of it in authoritative, contemporaneous descriptions of the situation. Accordingly, we have set forth in the margin excerpts from the message of the President to the Congress upon the State of the Union, January 6, 1942,[5] from a

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Gratt. 470, 473. See cases cited in 42 A. B. A. Rep. 234 n. 1, and see *Selective Draft Law Cases*, 245 U. S. 366; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29; *In re Grimley*, 137 U. S. 147, 153.

[5] "Our own objectives are clear: The objective of smashing the militarism imposed by war lords upon their enslaved peoples; the objective of liberating the subjugated nations; the objective of establishing and securing freedom of speech, freedom of religion, freedom from want, and freedom from fear everywhere in the world.

"We shall not stop short of these objectives; nor shall we be satisfied merely to gain them and call it a day. I know that I speak for the American people—and I have good reason to believe I speak also for all the other peoples who fight with us—when I say that this time we are determined not only to win the war, but also to maintain the security of the peace which will follow.

"But modern methods of warfare make it a task, not only of shooting and fighting, but an even more urgent one of working and producing.

"Victory requires the actual weapons of war and the means of transporting them to a dozen points of combat.

"It will not be sufficient for us and the other united nations to produce a slightly superior supply of munitions to that of Germany, Japan, Italy, and the stolen industries in the countries which they have overrun.

"The superiority of the united nations in munitions and ships must be overwhelming—so overwhelming that the Axis nations can never hope to catch up with it. In order to attain this overwhelming

report of the Special Committee of the Senate Investigating the National Defense Program under the chairman-

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superiority the United States must build planes and tanks and guns and ships to the utmost limit of our national capacity. We have the ability and capacity to produce arms not only for our own forces but also for the armies, navies, and air forces fighting on our side.

"And our overwhelming superiority of armament must be adequate to put weapons of war at the proper time into the hands of those men in the conquered nations, who stand ready to seize the first opportunity to revolt against their German and Japanese oppressors, and against the traitors in their own ranks, known by the already infamous name of 'Quislings.' As we get guns to the patriots in those lands, they too will fire shots heard 'round the world.

"This production of ours in the United States must be raised far above its present levels, even though it will mean the dislocation of the lives and occupations of millions of our own people. We must raise our sights all along the production line. Let no man say it cannot be done. It must be done—and we have undertaken to do it.

"I have just sent a letter of directive to the appropriate departments and agencies of our Government, ordering that immediate steps be taken:

"1. To increase our production rate of airplanes so rapidly that in this year, 1942, we shall produce 60,000 planes, 10,000 more than the goal set a year and a half ago. This includes 45,000 combat planes—bombers, dive-bombers, pursuit planes. The rate of increase will be continued, so that next year, 1943, we shall produce 125,000 airplanes, including 100,000 combat planes.

"2. To increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks; and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

"3. To increase our production rate of antiaircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them; and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

"4. To increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons as compared with a 1941 production of 1,100,000. We shall continue that increase so that next year, 1943, we shall build 10,000,000 tons.

"These figures and similar figures for a multitude of other imple-

ship of Senator Harry S. Truman, of Missouri, March 30, 1943,[6] and from the affidavit of Robert P. Patterson, Un-

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ments of war will give the Japanese and Nazis a little idea of just what they accomplished in the attack on Pearl Harbor.

"Our task is hard—our task is unprecedented—and the time is short. We must strain every existing armament-producing facility to the utmost. We must convert every available plant and tool to war production. That goes all the way from the greatest plants to the smallest—from the huge automobile industry to the village machine shop.

"Production for war is based on men and women—the human hands and brains which collectively we call labor. Our workers stand ready to work long hours; to turn out more in a day's work; to keep the wheels turning and the fires burning 24 hours a day, and 7 days a week. They realize well that on the speed and efficiency of their work depend the lives of their sons and their brothers on the fighting fronts.

"Production for war is based on metals and raw materials—steel, copper, rubber, aluminum, zinc, tin. Greater and greater quantities of them will have to be diverted to war purposes. Civilian use of them will have to be cut further and still further—and, in many cases, completely eliminated.

"War costs money. So far, we have hardly even begun to pay for it. We have devoted only 15 percent of our national income to national defense. As will appear in my Budget Message tomorrow, our war program for the coming fiscal year will cost $56,000,000,000 or, in other words, more than one-half of the estimated annual national income. This means taxes and bonds and bonds and taxes. It means cutting luxuries and other nonessentials. In a word, it means an all-out war by individual effort and family effort in a united country.

"Only this all-out scale of production will hasten the ultimate all-out victory. Speed will count. Lost ground can always be regained—lost time never. Speed will save lives; speed will save this Nation which is in peril; speed will save our freedom and civilization—and slowness has never been an American characteristic." 88 Cong. Rec. 32, 33–34 (1942).

[6] "Ever since the beginning of the last war there has been a constant effort to find an effective method of controlling war profits without impeding war production. The renegotiation law is the latest product of such efforts. To obtain speed we have had to use contracting methods that would never have been tolerated in peacetime.

Footnote 6.—Continued.

We granted cost-plus-fixed-fee contracts where the specifications were not known or had to be subject to numerous changes or where there was no time to prepare detailed specifications. We also granted lump-sum contracts for many items which had never before been made in quantity and for which estimates of cost were mere guesses. This was particularly true of the billions of dollars of war contracts which were hastily 'shoveled' out early in January 1942.

"Is the renegotiation law a necessary and desirable method of counteracting the wasteful effects of such necessary practices in early wartime procurement? Is it being administered in such a way as to give effect to the statutory intent? What changes, if any, are needed?

"As to the necessity and desirability of the renegotiation law:

"(1) Because of the wartime need for rapid procurement of materials of war, new materials with which there has been no previous manufacturing experience and other articles previously manufactured only in relatively small quantities, some procedure for subsequent price adjustment is necessary and desirable if excessive war profits and costs are to be avoided.

"(2) Taxes alone will not do the job because (*a*) higher corporate tax rates are likely to encourage higher costs and discourage economical production; (*b*) no scheme of taxation has been devised which is sufficiently flexible to provide an incentive for efficient low-cost production; (*c*) a profit percentage which would fairly reward one war contractor with one type of financial structure would bankrupt a second contractor with a different financial set-up, and would provide inordinately excessive profits for a third contractor with a still different financial problem.

"(3) War contractors in most cases can protect themselves against loss by escalator clauses and other contract provisions for contingencies. The people can obtain protection in many cases only through some procedure such as renegotiation.

"(4) Experience has shown 'cost-plus' contracts to be worse than worthless in the effort to prevent excessive costs. They strongly tend to increase costs instead of the reverse.

"The administration of the renegotiation law during the first 10 months of its existence has been characterized by two significant accomplishments:

"(1) The assembly in Government of an unusual group of able, conscientious, and patriotic lawyers, accountants, and businessmen as administrators of renegotiation;

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der Secretary of War, dated August 3, 1945,[7] in the form filed in each of the three cases before us.

"(2) The gradual education of war contractors as to the reasons for and importance of their adopting a policy of tailoring their own profits to levels which, in their own special situations, are fair both to them and to the Government.

"On the other hand, the administration of the renegotiation law and the law itself are properly subject to certain constructive criticisms:

"(1) Substantial variations in administrative policy and attitude still exist among the four departments charged with responsibility for renegotiation, although this condition has been noticeably improved in recent weeks. The existence of such a condition has created wholly unnecessary confusion, uncertainty, and misunderstanding among contractors.

"(2) Results of Navy renegotiations to date justify an inference that in its early proceedings the Navy Price Adjustment Board may have been too strongly influenced by a desire to achieve the same kind of mathematical exactness which results from a cost-plus-a-percentage-of-cost contract, a result which is inconsistent with the flexibility which was the basic purpose of the renegotiation law.

"(3) Army administration has been rendered unnecessarily cumbersome by use of military channels in the handling of an essentially business and financial enterprise.

"(4) The principles and results of renegotiation have been shrouded with entirely too much secrecy not only as to the public but as to the renegotiators themselves, causing many war contractors to be distracted by wholly unwarranted but nevertheless natural fears of the unknown.

"(5) In some cases the cost audits incident to renegotiation and taxation have been unnecessarily duplicatory.

"(6) It is impossible to recover every last dollar of excessive war profits without unnecessarily interfering with war production, and overzealous administration of the vast powers delegated by this law could be seriously detrimental to war procurement." S. Rep. No. 10, Part 5, 78th Cong., 1st Sess. 1–3 (1943).

[7] "5. The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to

The above-mentioned excerpts describe a demand for production of war supplies in proportions previously un-

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the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; it is likewise true, though perhaps in lesser degree, wherever the quantities to be manufactured are sharply increased over pre-war amounts. Accordingly, advance prices quoted in good faith by manufacturers in a large number of cases have little relation to costs actually experienced in the course of production. Furthermore, many manufacturers feel unable to quote firm prices without including reserves to cover many contingencies the occurrence of which might skyrocket their costs, and so overturn all their estimates.

"6. These were the conditions of wartime procurement, after December 7, 1941, and the War Department had to force its procurement activities into their mold. Efforts were made, of course, to develop contractual devices which would minimize the paramount difficulty in estimating production costs. The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage of removing financial incentives to efficiency and of imposing a heavy burden of auditing upon the Government and the contractor. Escalator clauses, permitting prices to be adjusted according to fluctuations in indices of labor and material costs, were also used but proved unworkable. Letters of intent, under which manufacture was commenced prior to the negotiation of a formal contract, helped to speed production, but could not, of course, solve the ultimate problem of decreasing costs and preventing excessive profits.

"7. Shortly after the declarations of war, both the legislative and the executive branches of the Government realized that excessive wartime profits were certain to accrue unless counter measures were taken. The evil effect of such wartime excessive profit on the morale of the fighting forces and the civilian population, as well as the unnecessary financial burden upon the Government, could not be ignored. The example of the last war was still fresh. Many war contractors realized the dangers and inequities resulting from such excessive profit, and some of them made refunds of excessive profits or voluntarily reduced their prices. In the spring of 1942, the War Department developed cost analysis units to check, so far as practicable, on production costs, and set up a price adjustment board to negotiate with contractors for voluntary price reductions and refunds of past payments. Tentative policies as to what profits were

imagined. They call for production in a volume never before approximated and at an undreamed of speed.

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excessive were established and meetings with contractors had. At the same time, there came into use contract clauses providing for the renegotiation or redetermination of contract prices after an initial period of production had laid a basis for the proper estimation of costs. We hoped that these means would keep incentives to efficiency alive and at the same time would tend to eliminate undue profits such as were then coming to light.

"8. The Congress apparently felt, however, that these contractual measures, resting as they did upon the voluntary cooperation of a relatively small number of war contractors, did not provide enough certainty that excessive profits would be eliminated. The Vinson-Trammel Act, limiting profits on aircraft and ship construction, had been repealed in 1940, but an effort was made to revive it. In March, 1942, the War Department and the War Production Board opposed such legislation on the ground that a flat percentage profit limitation would impede production and would be unfair to many contractors and too generous to others. After the Case amendment imposing such a flat percentage limitation on profits from war contracts had been adopted by the House of Representatives late in March, 1942, the armed services and the War Production Board offered a substitute proposal giving statutory authority to the process of voluntary renegotiation which had been developing. Congress adopted the principle of renegotiation with which the armed services were in accord (rather than the principle of a flat percentage limitation of profits), and it also endowed the procuring agencies with power to determine excessive profits when no bilateral agreement could be reached with the contractor. I believe that this addition by the Congress of the power of unilateral action was a wise and a necessary one, and that without it renegotiation would not have accomplished anything like the results that have been achieved.

. . . . . .

"12. . . . Some conception of the vast scope of the procurement activity of the armed services after the attack on Pearl Harbor can be gained from the fact that the total expenditures of the War and Navy Departments for the one fiscal year ending June 30, 1942 ($22,905,000,000) considerably exceeded the total military and naval expenditures of the Government from 1789 through the end of World War I." Affidavit of Robert P. Patterson, Under Secretary of War, sworn to August 3, 1945.

The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine qua non* condition of the survival of the nation. Not only was it "necessary and proper" for Congress to provide for such production in the successful conduct of the war, but it was well within the outer limits of the constitutional discretion of Congress and the President to do so under the terms of the Renegotiation Act. Accordingly, the question before us as to the constitutionality of the Renegotiation Act is not that of the power of the government to renegotiate and recapture war profits. The only questions are whether the particular method of renegotiation and the administrative procedure prescribed conformed to the constitutional limitations under which Congress was permitted to exercise its basic powers.

Our first question relates to the method of adjusting net compensation for war services through the compulsory "renegotiation" of profits under existing contracts between private parties, including recourse to unilateral orders for payments into the Treasury of the United States of such portions of those profits as were determined by the administrative officials of that Government to be "excessive profits." There were added the limitations that the contracts were for war goods in time of war, the ultimate payment for which was, in any event, to come from the Government and that, at the time of this impingement of the Renegotiation Act upon them, the contracts must not have been completed to the extent that final payments had been made on them.

One approach to the question of the constitutional power of Congress over the profits on these contracts is to recognize that Congress, in time of war, unquestionably has the fundamental power, previously discussed, to conscript men and to requisition the properties necessary and proper to enable it to raise and support its Armies. Congress furthermore has a primary obligation to bring

about whatever production of war equipment and supplies shall be necessary to win a war. Given this mission, Congress then had to choose between possible alternatives for its performance. In the light of the compelling necessity for the immediate production of vast quantities of war goods, the first alternative, all too clearly evident to the world, was that which Congress did not choose, namely, that of mobilizing the productive capacity of the nation into a governmental unit on the totalitarian model. This would have meant the conscription of property and of workmen. It would have meant the raising of supplies for the Armies in much the same manner as that in which Congress raised the manpower for such Armies. Already the nation had some units of production of military supplies in the form of arsenals, navy yards, and in the increasing number of governmentally owned, if not operated, war material plants. The production of the atomic bombs was one example of a war industry owned and operated exclusively by the Government. Faced with this ironical alternative of converting the nation in effect into a totalitarian state in order to preserve itself from totalitarian domination, that alternative was steadfastly rejected. The plan for Renegotiation of Profits which was chosen in its place by Congress appears in its true light as the very symbol of a free people united in reaching unequalled productive capacity and yet retaining the maximum of individual freedom consistent with a general mobilization of effort.

Somewhat crude in its initial statutory simplicity, the Renegotiation Act developed rapidly as the demand for war production increased beyond precedent. First approved April 28, 1942, less than five months after our declaration of war, the Act was adjusted and strengthened in its effectiveness and fairness by the numerous amendments made to it.[8] The nation previously had expe-

[8] See note 1, *supra*.

rienced different, but fundamentally comparable, federal regulation of civilian liberty and property in proportion to the increasing demands of modern warfare.[9]

The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of cost were out of the question. Laying aside as undesirable the complete governmental ownership and operation of the production of war goods of all kinds, many alternative solutions were attempted. Often these called for capital expenditures by the Gov-

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[9] *McKinley* v. *United States,* 249 U. S. 397 (regulations of local activities near federal military stations); *Northern Pacific R. Co.* v. *North Dakota,* 250 U. S. 135 (seizure and operation of railroads); *Hamilton* v. *Kentucky Distilleries and W. Co.,* 251 U. S. 146 (local liquor traffic); *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554 (seizure of enemy property); *Hirabayashi* v. *United States,* 320 U. S. 81 (curfew regulations); *Yakus* v. *United States,* 321 U. S. 414 (Emergency Price Control Act); *Bowles* v. *Willingham,* 321 U. S. 503 (rent control); and *Korematsu* v. *United States,* 323 U. S. 214 (exclusion of civilians from west coast military area).

In *Hirabayashi* v. *United States, supra,* this Court said (p. 93):

"The war power of the national government is 'the power to wage war successfully.' See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

ernment in building new plant facilities. Adhering, however, to the policy of private operation of these facilities, Congress and the Administration sought to promote a policy of wide distribution of prime contracts and subcontracts, even to comparatively high cost marginal producers of unfamiliar products. Congress sought to do everything possible to retain and encourage individual initiative in the world-wide race for the largest and quickest production of the best equipment and supplies. It clung to its faith in private enterprise. The problem was to find a fair means of compensation for the services rendered and the goods purchased. Contracts were awarded by negotiation wherever competitive bidding no longer was practicable. Contracts were let at cost-plus-a-fixed-fee. Escalator clauses were inserted. Price ceilings were established. A flat percentage limit on the profits in certain lines of production was tried. Excess profits taxes were imposed. Appeals were made for voluntary refunds of excessive profits. However, experience with these alternatives convinced the Government that contracts at fixed initial prices still provided the best incentive to production.[10]

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[10] "20. At the beginning of the limited emergency in 1939, the only applicable statutory limits on profits from the sale of military or naval supplies were contained in the Vinson-Trammel Act of March 27, 1934, as amended (relating to naval vessels) and the Merchant Marine Act of 1936, as amended (relating to construction of merchant ships). The Act of April 3, 1939, extended percentage profit limitation to cover Army aircraft contracts. The percentage of profit allowed to contractors was lowered to approximately 8% by the Act of June 28, 1940, but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, provided that as to aircraft the old limitation of 12% was to prevail.

"21. . . . Accordingly, the Second Revenue Act of 1940, containing the excess profits tax, suspended the profit limitation statutes applicable to Army and Navy contracts entered into after December 31, 1939, or uncompleted on that date by contractors and subcontractors subject to the new excess profits tax. Thereafter, until the

On February 16, 1942, this Court in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, pointed to the possibility of legislative relief. It said (p. 309):

> "The problem of war profits is not new. In this country, every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized. See Hearings before the House Committee on Military Affairs on H. R. 3 and H. R. 5293, 74th Cong., 1st Sess., 590–598. To meet this recurrent evil, Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed limit on profits, or has recaptured high profits through taxation. It has expressly reserved for the Government the right to cancel contracts after they have been made. Pursuant to Congressional authority, the Government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials. It may be that one or some or all of these measures should be utilized more comprehensively, or that still other measures must be devised. But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them."

Finally the compulsory renegotiation of contracts was authorized. The procedure outlined in the Original Renegotiation Act, April 28, 1942, was rapidly perfected. As it developed it required advance consents to such renegotiation to be written into the respective contracts

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passage of the Sixth Supplemental National Defense Appropriation Act of 1942, the only statutory provisions concerning war or defense contracts were those of the excess profits tax." Affidavit of Robert P. Patterson, Under Secretary of War, sworn to August 3, 1945.

And see Hensel and McClung, *Profit Limitation Controls Prior to the Present War,* 10 Law & Contemp. Prob. 187 (1943–1944).

and subcontracts for war goods prior to their award and finally it made express provision for a redetermination of the excessive profits, in a proceeding *de novo* before the Tax Court, wherever a war goods contractor or subcontractor was aggrieved by the administrative order. Throughout these developments extended congressional and public consideration was given to the issues presented.[11]

The plan proved itself readily adaptable to the needs of the time. It called for initial contract estimates based upon the best available information at the time of enter-

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[11] The following significant congressional hearings were publicly held:

Hearings before the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. (September 22 and 23, 1942);

Hearings before a Subcommittee of the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. (September 29 and 30, 1942);

Hearings before the Subcommittee of the House Committee on Appropriations on Mil. Est. App. Bill for 1944, 78th Cong., 1st Sess. 483–518, 571–580 (June 10, 1943);

Hearings before the Subcommittee of the Senate Committee on Appropriations on H. R. 2996 (Mil. Est. App. Bill for 1944), 78th Cong., 1st Sess. 22, 30–33, 125–138, 150–151 (1943);

Hearings before the House Committee on Naval Affairs, pursuant to H. R. Res. 30, Vol. 2, 78th Cong., 1st Sess. (June 10–30, 1943);

Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015 (Renegotiation of War Contracts), 78th Cong., 1st Sess. (September 9–23, 1943);

Hearings before the Senate Committee on Finance on H. R. 3687 (Revenue Act of 1943), 78th Cong., 1st Sess. 49, 388–392, 402–424, 443–452, 465, 469, 598–601, 620–629, 669–684, 690–696, 925–926, 987–1111, 1121–1132 (November 29–December 15, 1943);

Hearings before the House Committee on Ways and Means on H. R. 2628 (extension of termination date of Renegotiation Act), 79th Cong., 1st Sess. (April 12–16, 1945).

In addition, private hearings and interviews appear to have been had by Congressional Committees.

The following major reports on the operation of the Renegotiation Act were issued by Congressional Committees:

ing into the contracts. Production proceeded at once on the basis of those estimates. Many factors were incapable of exact advance determination. The final net compensation, however, resulted from a renegotiation made after both parties had had the benefit of actual experience under the contract. This determination of the allowable profit was guided by many relevant factors. A list of commonly relevant factors was presented in an early administrative directive. Later such a list was enacted into the statute. Each administrative determination was made subject to a redetermination in a proceeding *de novo* in the Tax Court provided a timely petition for it was filed by the aggrieved contractor or subcontractor. The Act always has been limited in duration to a period during and shortly following the war. In most instances the Act has resulted in a disposition of cases

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H. R. Rep. No. 733, 78th Cong., 1st Sess. (October 7, 1943). Report of the Committee on Naval Affairs, pursuant to H. R. Res. 30 (Renegotiation of War Contracts);

Sen. Rep. No. 10, Part 5, 78th Cong., 1st Sess. (March 30, 1943). Additional Report of the Special Senate Committee Investigating the National Defense Program (Renegotiation of War Contracts);

Sen. Rep. No. 10, Part 16, 78th Cong., 2d Sess. 40–64, 192–199 (March 4, 1944). Additional Report of the Special Senate Committee Investigating the National Defense Program (Third Annual Report);

H. R. Rep. No. 871, 78th Cong., 1st Sess. 75–90 (November 18, 1943), on H. R. 3687 (Revenue Bill of 1943);

Sen. Rep. No. 627, 78th Cong., 1st Sess. 98–119 (December 22, 1943), on H. R. 3687 (Revenue Bill of 1943);

H. R. Rep. No. 1079, 78th Cong., 2d Sess. 34–39, 76–88 (February 4, 1944), on H. R. 3687 (Conference Report on Revenue Act of 1943).

See also:

Renegotiation of War Contracts—Law, Debates and Other Legislative Materials—Compiled for the use of the House Committee on Ways and Means, 78th Cong., 1st Sess. (1943);

Data on Renegotiation of Contracts, Senate Committee on Finance (December 9, 1943).

by agreements reached between the parties.[12] The controversies which have survived to this day are, in large measure, not those dealing with the constitutionality of the general effect of the plan or even with the finality of redetermination under the prescribed administrative procedure, but are those arising out of an alleged abuse of discretion in its administration..

THE RENEGOTIATION ACT.

While there have been six legislative steps[13] in the development of the Renegotiation Act, the portions of it that are especially material here consist of certain

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[12] In its brief filed jointly in the present cases the Government has submitted the following statement as to the results of renegotiation:

"11. *The results of renegotiation:* We are advised by the War Contracts Price Adjustment Board that as of June 30, 1947, 118,101 contractors had been assigned for renegotiation with respect to 1942 through 1946 fiscal years, and contracts aggregating over $190,000,000,000 (excluding contractors eliminated because of exemptions or non-coverage) were subjected to renegotiation. Of the total assignments, 115,535 (or 97.8%) were completed as of June 30, 1947. Out of the 115,535 completed assignments, 85,037 (or 73.6%) resulted in cancellations or clearances indicating that no excessive profits had been made or that the contractor was found to be exempt from renegotiation; 28,889 (or 25%) resulted in bilateral refund agreements between the Government and the contractor; 1,609 (or 1.4%) resulted in unilateral determinations by the Departments or the War Contracts Price Adjustment Board. Of the 30,498 assignments involving determinations of excessive profits, 1,609 (or 5.28%) were unilateral determinations and 28,889 (or 94.72%) were bilateral.

"Also as of June 30, 1947, the gross recoveries through renegotiation amounted to some $10,434,637,000, and the estimated net recovery (after deduction of the federal tax credit allowed contractors on renegotiation refunds) amounted to $3,130,391,000. Of the total gross recoveries of $10,434,637,000, some $895,493,000 (or 8.58%) were involved in unilateral determinations and the rest were recovered by voluntary agreement."

[13] See note 1, *supra*.

language in the so-called Original Renegotiation Act contained in § 403 of the Sixth Supplemental Defense Appropriations Act, approved April 28, 1942; [14] in the amendments made by the Revenue Act of 1942, October 21, 1942; [15] and its further amendment and substantial expansion by § 701 (b) of the Revenue Act of 1943, February 25, 1944.[16] In that form it is sometimes called the Second Renegotiation Act, but the entire § 403, both in its original and amended forms may be properly cited as the "Renegotiation Act." [17] In the proceedings leading up to the enactment of the Original Renegotiation Act, an alternative in the form of a rigid limitation of profits was rejected in favor of the more flexible definition embodied in the term "excessive profits." [18] The War Department Directive of August 10, 1942, entitled "Principles, Policy and Procedure to be Followed in Renegotiation" promptly stated the factors to be stressed in determining excessive profits. This directive was introduced in the hearings held by the Finance Committee of the Senate in September [19] and thus was before the Senate at the time of the passage of the above-mentioned Reve-

[14] For relevant excerpts from its text, see Appendix I, *infra*, p. 793.

[15] For relevant excerpts from its text, see Appendix II, *infra*, p. 795.

[16] For relevant excerpts from its text, see Appendix III, *infra*, p. 798.

[17] See § 403 (l) in note 1, *supra*.

[18] In the House of Representatives, the Case Amendment, providing in effect a limitation of 6% on war profits was adopted without debate. 88 Cong. Rec. 3139–3140 (1942). Before the Senate Subcommittee on Appropriations strong objection was made to this provision by the representatives of the Government and its omission was recommended by the Senate Committee on Appropriations. After ample consideration it was omitted in the Act as passed. 88 Cong. Rec. 3378–3405; 3582–3599; 3647–3662; 3666 (1942), and see H. R. Rep. No. 2030, 77th Cong., 2d Sess. 8–10 (1942).

[19] Hearings before the Subcommittee of the Senate Committee on Finance on Pub. L. No. 528, 77th Cong., 2d Sess. 16–28 (September 29, 1942).

nue Act of 1942, October 21, 1942, which made important amendments in the Renegotiation Act.

The "Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations" dealing with the Renegotiation Act was issued March 31, 1943. This was considered at the Hearings before the House Committee on Naval Affairs, 78th Cong., 1st Sess., Vol. 2, pp. 469, *et seq.*, 1025–1039, especially 1028–1029 (1943). Finally the above-mentioned Revenue Act of 1943, 58 Stat. 21, on February 25, 1944, largely incorporated these views in § 403 (a) (4) (A),[20] thus indicating congressional approval of this administrative practice and further assuring continuity of it during the balance of the life of the Act.

DELEGATION OF AUTHORITY UNDER THE RENEGOTIATION ACT.

The petitioners contend that the Renegotiation Act unconstitutionally attempted to delegate legislative power to administrative officials. The United States does not contest the right of the courts to decide the issues as to the validity of the Act on its face in the present cases, each of which was instituted after the petitioners' respective rights to a Tax Court redetermination had been forfeited. We find no reason for not reaching here the constitutionality of the Act. Cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; *Wade* v. *Stimson,* 331 U. S. 793; *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540; *Yakus* v. *United States,* 321 U. S. 414.

The constitutional argument is based upon the claim that the delegation of authority contained in the Act carried with it too slight a definition of legislative policy and standards. Accordingly, it is contended that the resulting determination of excessive profits which were

[20] See Appendix III, *infra,* p. 798.

claimed by the United States amounted to an unconstitutional exercise of legislative power by an administrative official instead of a mere exercise of administrative discretion under valid legislative authority. We hold that the authorization was constitutional. Certainly as spelled out in § 403 (a) (4) (A)[21] of the Second Renegotiation Act with respect to fiscal years ending after June 30, 1943, there can be no objection on this ground. This question, therefore, relates to the delegation of authority as made by the Act before the effective date of the Second Renegotiation Act. The argument on this question is limited to the *Lichter* and *Alexander* cases, inasmuch as the excessive profits determined to exist in the *Pownall* case were so found by the War Contracts Price Adjustment Board under the Second Renegotiation Act.

1. The Statutory Language.

The Original Renegotiation Act,[22] approved April 28, 1942, provided in § 403 (b), (c), (d) and (e) for the renegotiation of all contracts and subcontracts thereafter made and also of all contracts and subcontracts theretofore made by the War Department, the Navy Department or the Maritime Commission, whether or not such contracts or subcontracts contained a renegotiation or recapture clause, provided the final payment pursuant thereto had not been made prior to April 28, 1942. The renegotiation was to be done by the Secretary of the Department concerned. For this purpose the Chairman of the Maritime Commission was included in the term "Secretary." The services of the Bureau of Internal Revenue were made available upon the request of each Secretary, subject to the consent of the Secretary of the Treasury, for the purposes of making examinations and determinations with

[21] See Appendix III, *infra*, p. 798.

[22] See Appendix I, *infra*, p. 793.

respect to profits under the Section. The Secretary of each Department was authorized and directed, whenever in his opinion excessive profits had been realized or were likely to be realized from any contract with such Department or from any subcontract thereunder, to require the contractor or subcontractor to renegotiate the contract price. In case any amount of the contract price was found as a result of such renegotiation to represent "excessive profits" which had been paid to the contractor or subcontractor, the Secretary was authorized to recover them.

There was no express definition of the term "excessive profits" in the Original Renegotiation Act. However, in its § 403 (b),[23] there was a relevant statement in connection with the renegotiation clauses required to be inserted in future contracts and subcontracts for an amount in excess of $100,000 each. The Secretary was required to insert in such contracts, thereafter made by his Department, "a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; . . . ." Contractors were also to be required to insert a like provision in their subcontracts. This statement indicated a relationship between current "excessive profits" and those which later might be determined with "reasonable certainty."

Also, in § 403 (d)[24] it was provided that, in renegotiating a contract price or determining excessive profits, the Secretaries of the respective Departments should not make allowances "for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, . . ." nor "for any excessive reserves set up by the contractor or for any costs

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[23] See Appendix I, *infra*, p. 793.

[24] See Appendix I, *infra*, p. 794.

incurred by the contractor which are excessive and unreasonable."

The amendments made to this Section by the Revenue Act of 1942,[25] approved October 21, 1942, were made effective as of April 28, 1942. At the time they were approved, Congress had knowledge of the War Department Directive of August 10, 1942,[26] which had been put into effect stressing certain factors which the Secretary emphasized in determining excessive profits. While Congress then made several amendments to § 403, those amendments did not alter the effect of such directive in this particular. Among the amendments that were then added there was the following purported definition of "excessive profits": "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." In the light of the existing administrative practices this at least expressed a congressional satisfaction with the existing specificity of the Act. The amendment made to § 403 (c) (3)[27] required the recognition of exclusions and deductions of the character afforded by certain provisions of the Internal Revenue Code. The amendment to § 403 (c) (5)[28] provided also that the Secretaries, by joint regulation, might prescribe the form and detail in which certain data might be filed by contractors and subcontractors bearing upon their profits under their contracts. This material concerned "statements of actual costs of production" and "other financial statements for

[25] See Appendix II, *infra*, p. 795.

[26] Published as part of the material submitted by Under Secretary of War Robert P. Patterson at the Hearings on the Renegotiation of Contracts before a Subcommittee of the Senate Committee on Finance on § 403 of Pub. L. No. 528, 77th Cong., 2d Sess. 28, 34–43 (September 29, 1942).

[27] See Appendix II, *infra*, p. 796.

[28] See Appendix II, *infra*, p. 797.

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any prior fiscal year or years." Under some circumstances, in the absence of a notice from the Secretary and in the absence of the commencement of renegotiations, it was provided that "the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged." A new subsection (i)[29] was added containing new exceptions and exemptions from the Act. The "Joint Statement by the War, Navy, and Treasury Department and the Maritime Commission—Purposes, Principles, Policies, and Interpretations" issued March 31, 1943,[30] similarly contributed definiteness to the current administrative practice.

2. The Validity of the Delegation of Authority.

It is in the light of these statutory provisions and administrative practices that we must determine whether the Renegotiation Act made an unconstitutional delegation of legislative power. On the basis of (a) the nature of the particular constitutional powers being employed, (b) the current administrative practices later incorporated into the Act and (c) the adequacy of the statutory term "excessive profits" as used in this context, we hold that the authority granted was a lawful delegation of administrative authority and not an unconstitutional delegation of legislative power.

(a) *A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.*—This power is especially significant in connection

[29] See Appendix II, *infra*, p. 798.

[30] See Hearings before the House Committee on Naval Affairs, 78th Cong., 1st Sess., Vol. 2, pp. 469, *et seq.*, 1025–1039, especially 1028–1029 (1943).

with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. In peace or in war it is essential that the Constitution be scrupulously obeyed,[31] and particularly that the respective branches of the Government keep within the powers assigned to each by the Constitution. On the other hand, it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect in order that, through the Constitution, the people of the United States may in time of war as in peace bring to the support of those purposes the full force of their

[31] "The question remains: What may be deemed to be the force and effect in time of war of the restrictive provisions contained in the constitution with respect to the exercise of federal authority? It is manifest, at once, that the great organs of the National Government retain and perform their functions as the constitution prescribes. Senators and Representatives are qualified and chosen as provided in the constitution and the legislative power vested in the Congress must be exercised in the required manner. The President is still the constitutional Executive, elected in the manner provided and subject to the restraints imposed upon his office. The judicial power of the United States continues to be vested in one Supreme Court and such inferior courts as Congress has ordained. Again, apart from the provisions fixing the framework of the Government, there are limitations which by reason of their express terms or by necessary implication must be regarded as applicable as well in war as in peace. Thus one of the expressed objects of the power granted to Congress 'to lay and collect Taxes, Duties, Imposts, and Excises' is to 'provide for the common defence,' and it cannot be doubted that taxes laid for this purpose, that is, to support the army and navy and to provide the means for military operations, must be laid subject to the constitutional restrictions." Address by Honorable Charles E. Hughes, of New York, on "War Powers Under the Constitution," September 5, 1917, 42 A. B. A. Rep. 232, 241–242.

united action. In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.

In an address by Honorable Charles E. Hughes, of New York, on "War Powers Under The Constitution," September 5, 1917, 42 A. B. A. Rep. 232, 238–239, 247–248, he said:

> "The power to wage war is the power to wage war successfully. The framers of the constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government entrusted with the common defence. In equipping the National Government with the needed authority in war, they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command. . . .
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> "The extraordinary circumstances of war may bring particular business[es] and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thoroughgoing public regulation. The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people during the stress of conflict, are plainly of this sort. Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers con-

fided to Congress to enable it to prosecute a successful war.

"In the words of the Supreme Court: 'It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the power which it confers on the one hand it does not immediately take away on the other. . . .' [32] This was said in relation to the taxing power. Having been granted in express terms, the Court held it had not been taken away by the due process clause of the Fifth Amendment. As the Supreme Court put it in another case: 'the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.' [33]

"Similarly, it may be said that the power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties. These rest upon the preservation of the nation.

"It has been said that the constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in

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[32] *Billings* v. *United States*, 232 U. S. 261, 282.

[33] *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24.

> their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution. We cannot at this time fail to appreciate the wisdom of the fathers, as under this charter, one hundred and thirty years old—the constitution of Washington—the people of the United States fight with the power of unity,—as we fight for the freedom of our children and that hereafter the sword of autocrats may never threaten the world."

The war powers of Congress and the President are only those which are to be derived from the Constitution but, in the light of the language just quoted, the primary implication of a war power is that it shall be an effective power to wage the war successfully. Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.[34]

In 1942, in the early stages of total global warfare, the exercise of a war power such as the power "To raise and support Armies, . . ." and "To provide and maintain a Navy; . . . ," called for the production by us of war goods in unprecedented volume with the utmost speed, combined with flexibility of control over the product and with a high degree of initiative on the part of the producers. Faced with the need to exercise that power, the question was whether it was beyond the constitutional power of Congress to delegate to the high officials named therein the discretion contained in the Original Renegotiation Act of April 28, 1942, and the amendments of October

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[34] "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, *provide for the common defence,* promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity,* do ordain and establish this Constitution for the United States of America." (Italics supplied.) U. S. Const. Preamble.

21, 1942. We believe that the administrative authority there granted was well within the constitutional war powers then being put to their predestined uses.

(b) *The administrative practices developed under the Renegotiation Act demonstrated the definitive adequacy of the term "excessive profits" as used in the Act.*—The administrative practices currently developed under the Act in interpreting the term "excessive profits" appear to have come well within the scope of the congressional policy. We have referred above to the War Department Directive of August 10, 1942,[35] and to the Joint Departmental Statement of March 31, 1943,[36] both of which were placed before appropriate Congressional Committees. These clearly stated practices are evidence of a current correct understanding of the congressional intent. This appears from the fact that the congressional action of October 21, 1942, made effective as of April 28, 1942, was taken in the light of the above-mentioned directive and without restricting its effect. Furthermore, the congressional action taken February 25, 1944, and made effective for the fiscal years ending after June 30, 1943, substantially incorporated into the statute the administrative practice shown in the Joint Departmental Statement of March 31, 1943. It thus became an express congressional definition of the factors appropriate for consideration in determining excessive profits, whereas before it was an administrative interpretation of "excessive profits" to the same effect.

(c) *The statutory term "excessive profits," in its context, was a sufficient expression of legislative policy and standards to render it constitutional.*—The fact that this term later was further defined both by administrative action and by statutory amendment indicates the prob-

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[35] See notes 19 and 26, *supra*.

[36] See note 30, *supra*.

able desirability of such added definition, but it does not demonstrate that such further definition was a constitutional necessity essential to the validity of the original exercise by Congress of its war powers in initiating a new solution of an unprecedented problem. The fact that the congressional definition confirmed the administrative practice which already was in effect under the original statutory language tends to show that a statutory definition was not necessary in order to give effect to the congressional intent.

In 1942 the imposition of excess profits taxes was a procedure already familiar to Congress, both as an emergency procedure to raise funds for extraordinary wartime expenditures, and as one to meet the needs of peace. The recapture of excess income as applied by Congress to the railroads had been upheld by this Court in 1924. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456. The opinions of this Court in *Yakus* v. *United States,* 321 U. S. 414; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529–542; and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 413–433, are not in conflict with our present position.

The policy and purpose of Congress in choosing the renegotiation of profits as an alternative to cost-plus contracts, to flat percentage limitations of profits, and to 100% excess profits taxes was an attempt to determine a fair return on war contracts, under conditions where actual experience alone could disclose what was fair and when the primary national need was for the immediate production of unprecedented quantities of new products. The action of Congress was an expression of its well-considered judgment as to the degree of administrative authority which it was necessary to grant in order to effectuate its policy. This action of Congress came within the scope of its discretion as described by Chief Justice Hughes in *Panama Refining Co.* v. *Ryan, supra,* at p. 421:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States,* 276 U. S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S. E. C.,* 329 U. S. 90, 104. The purpose of the Renegotiation Act and its factual background establish a sufficient meaning for "excessive profits" as those words are used in practice.[37] The word "excessive" appears twice in the

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[37] Excessive means: "Characterized by, or exhibiting, excess; as: *a* Exceeding what is usual or proper; overmuch. *b* Greater than the usual amount or degree; exceptional; very great." Webster's New International Dictionary, 2d ed. (1938).

Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, ..." In the Original Renegotiation Act, § 403 (d),[38] there were expressly disallowed to the contractor in determining his profits "compensation paid by a contractor to its officers or employees in excess of a reasonable amount, . . ." and "any costs incurred by the contractor which are excessive and unreasonable." "Excessive profits are those in excess of reasonable profits." *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 423.

The following, somewhat comparable, legislative specifications are among those which have been held to state a sufficiently definite standard for administrative action:

"Just and reasonable" rates for sales of natural gas, *Federal Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 600–601; "public interest, convenience, or necessity" in establishing rules and regulations under the Federal Communications Act, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226; prices yielding a "fair return" or the "fair value" of property, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 397–398; "unfair methods of competition" distinct from offenses defined under the common law, *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 311–312, 314; "just and reasonable" rates for the services of commission men, *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 431; and "fair and reasonable" rent for premises, with final determination in the courts, *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 243, 248–250.

3. Methods Prescribed and Limitations Imposed on the Administration.

The methods prescribed and the limitations imposed by Congress upon the contemplated administrative action

[38] See Appendix I, *infra*, p. 794.

are helpful. The Act is confined to the duration of the war or to a short time thereafter. Renegotiation, from the beginning, has been confined to the elimination of excessive profits from contracts and subcontracts with certain governmental departments directly related to the conduct of the war. By subsequent amendments the scope of the Act was limited by further express exceptions and exemptions. The administrative officials to whom authority was granted were clearly specified and were all officials of high governmental responsibility. Each was required to act whenever he found excessive profits existed under the conditions defined. The provisions for a redetermination of excess profits by the Tax Court *de novo* are discussed later. They likewise imposed important limitations on the allowable recoveries.

Accordingly, we hold that the delegation of authority here in issue, under the Renegotiation Act in its several forms, was a constitutional definition of administrative authority and not an unconstitutional delegation of legislative power.

THE RENEGOTIATION OF WAR CONTRACTS WAS NOT A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

The recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than the requisitioning or condemnation of private property for public use. One of the primary purposes of the renegotiation plan for redetermining the allowable profit on contracts for the production of war goods by private persons was the avoidance of requisitioning or condemnation proceedings leading to governmental ownership and operation of the plants producing war materials. A refund to the Government of excessive earnings of railroad carriers under the recapture provisions of § 15a of the

Transportation Act of 1920, 41 Stat. 488, has been sustained by this Court. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456. The collection of renegotiated excessive profits on a war subcontract also is not in the nature of a penalty and is not a deprivation of a subcontractor of his property without due process of law in violation of the Fifth Amendment.

THE RENEGOTIATION ACT, INCLUDING ITS AMENDMENTS, HAS BEEN PROPERLY APPLIED TO CONTRACTS ENTERED INTO BEFORE ITS AND THEIR RESPECTIVE ENACTMENTS.

The excessive profits claimed by the Government in these cases arose out of contracts between the respective petitioners and other private parties. None arose out of contracts made directly with the Government itself. All the contracts, however, related to subject matter within the meaning of the Renegotiation Act in its respective stages. The contracts all were of the type which came to be known, under the Act, as subcontracts. All, except four in the *Lichter* case, were entered into after the enactment of the Original Renegotiation Act, April 28, 1942, and on those four, the final payment had not been made by that date. We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government nor on any subcontract upon which final payment had been made before April 28, 1942, although relating to war goods made or services performed after the declaration of war, December 8, 1941. Congress limited the Renegotiation Act to future contracts and to contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act. These included contracts made directly with the Government and also subcontracts such as those here involved.

We uphold the right of the Government to recover excessive profits on each of the contracts before us. This right exists as to such excessive profits whether they arose from contracts made before or after the passage of the Act. A contract is equally a war contract in either event and, if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized as has been done here.

While the Original Renegotiation Act may not have expressly defined some of the contracts before us as subcontracts, the Act of October 21, 1942, in its amendments effective as of April 28, 1942, did so. Accordingly, the contracts entered into between private parties in the *Alexander* case between April 28, 1942, and October 21, 1942, come within the scope of the Renegotiation Act.

THE TAX COURT REMEDY.

Before the amendments incorporated in it on February 25, 1944, by the Revenue Act of 1943 (the so-called Second Renegotiation Act) the Original Renegotiation Act, as theretofore amended, did not provide expressly for a review or redetermination of the initial determination of the excess profits authorized to be made by the respective Secretaries. The 1944 amendments added not merely an express statement of factors to be taken into consideration in determining excessive profits (§ 403 (a) (4) (A)),[39] but also created a War Contracts Price Adjustment Board (§ 403 (d) (1))[40] to make such determinations in the future. Also, it provided expressly for petitions to be filed with the Tax Court to secure redeterminations of the orders of such Board. (§ 403 (e) (1).)[41] It expressly

[39] See Appendix III, *infra*, p. 799.

[40] See Appendix III, *infra*, p. 801.

[41] See Appendix III, *infra*, p. 801.

stated that "A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." (§ 403 (e) (1).) It provided also that "In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order [of the Board] shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." (§ 403 (c) (1).)[42] All of the determinations in the cases before us were made after February 25, 1944, and those in the *Pownall* case were made on behalf of the Board. The above procedure under § 403 (e) (1) accordingly was open to the petitioners in the *Pownall* case but they did not file a petition with the Tax Court.

In addition to the above procedures affecting future determinations of excessive profits to be made by the Board, the Second Renegotiation Act also made express provisions, in § 403 (e) (2),[43] for a redetermination by the Tax Court of excessive profits determined to exist by the respective Secretaries. These provisions applied first to any determinations made by a Secretary *prior to* February 25, 1944, with respect to a fiscal year ending before July 1, 1943. In those instances a petition for redetermination by the Tax Court was permitted to be filed within 90 days after February 25, 1944. We have no such case before us. These provisions applied also to any determination made by a Secretary *after* February 25, 1944, with respect to a fiscal year ending before July 1, 1943. In that event, a petition for redetermination by the Tax Court was permitted to be filed within 90 days after the date of the

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[42] See Appendix III, *infra*, p. 800.

[43] See Appendix III, *infra*, p. 801.

redetermination. We have such situations in the *Lichter* and *Alexander* cases.

No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief.

As to the effect of the statute and of the course of action taken, we hold that the statute did afford procedural due process to the respective petitioners but that none of them made use of the procedure so provided for them. Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such an agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a redetermination of the excessive profits, if any, *de novo* by the Tax Court. "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requi-

site hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152–153.

We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us. Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented there. Accordingly, there is excluded from our consideration in this proceeding the contention in the *Lichter* case that the petitioners' subcontracts were exempt from renegotiation on the ground that they were subcontracts under prime contracts with a Department of the Government and had been awarded to them as the result of competitive bidding for the construction of buildings and facilities. There is excluded also, for example, the contention in the *Pownall* case that petitioners' contracts which were for amounts under $100,000 each were not subject to renegotiation. Likewise, in the *Alexander* case, there is excluded the petitioner's contention that it had not made excessive profits within the meaning of the statute and that its contracts for processing wool were not "subcontracts" within the meaning of the Original Renegotiation Act.

For these reasons, we uphold the constitutionality of the Renegotiation Act on its face as authority for the recovery of excessive profits as ordered in the three respective cases before us, and we hold that the respective petitioners do not have the right to present questions

as to the coverage of that Act, as to the amount of excessive profits adjudged to be due from them or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition to that court for a redetermination of excessive profits, if any.

Accordingly, in each of the cases before us, the judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE MURPHY concurs in the result in these cases.

MR. JUSTICE JACKSON concurs in the result in the *Pownall* case, but dissents in the *Lichter* and *Alexander* cases.

[For opinion of MR. JUSTICE DOUGLAS, dissenting in part, see *post*, p. 802.]

APPENDIX.

I.

Excerpts from the so-called Original or First Renegotiation Act, § 403, Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245–246.

"(a) . . . For the purposes of subsections (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

"(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract

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under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

"(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make

allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. . . .

"(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. . . ."

. . . . . .

56 Stat. 245.

II.

Excerpts from Title VIII, Renegotiation of War Contracts, Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982–985, 26 U. S. C. A. *Internal Revenue Acts Beginning 1940,* Revenue Act of 1942, § 801, p. 376.

Section 801 of the Revenue Act of 1942 amended the Section in several particulars, all effective as of April 28, 1942. Among the amendments were certain additions or changes contained in § 403 (a), § 403 (c) and § 403 (i) and reading as follows:

"SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

"(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

. . . . . .

"(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

"(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any mate-

rial, part, assembly, machinery, equipment, or other personal property.

"For the purposes of subsections (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

. . . . .

"(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Sec-

retary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

"(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. . . .

"(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and sub-

contracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, ..."

. . . . . .

"(c) [SEC. 801.] Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

"(i) . . .

. . . . . .

"(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

"(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

"(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

"The Secretary may so exempt contracts and subcontracts both individually and by general classes or types."

. . . . . .

56 Stat. 982.

III.

Excerpts from the so-called Second Renegotiation Act, Title VII, Renegotiation of War Contracts, passed notwithstanding the objec-

tions of the President, February 25, 1944, c. 63, 58 Stat. 21, 78–92, 50 U. S. C. (Supp. V, 1946) § 1191; also 26 U. S. C. A. *Internal Revenue Acts Beginning 1940,* Revenue Act of 1943, § 701, p. 491.

While § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as expanded by § 701 (b) of the Revenue Act, 1943, is too long for reproduction here, the following excerpts from it are especially relevant: § 403 (a) (4) (A); § 403 (c) (1); § 403 (d) (1); § 403 (d) (4); § 403 (e) (1); § 403 (e) (2); § 403 (l); see also, § 701 (d) of the Revenue Act of 1943:

"SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

. . . . . .

"(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

. . . . . .

"(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

"(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

"(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

"(iii) amount and source of public and private capital employed and net worth;

"(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

"(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors

shall be published in the regulations of the Board from time to time as adopted.

. . . . .

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such deter-

mination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

. . . . . .

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. . . .

. . . . . .

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

. . . . . .

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . .

"(2) Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court

of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

. . . . .

"(l) This section may be cited as the 'Renegotiation Act'."

. . . . .

"(d) [SEC. 701.] EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act." 58 Stat. 78.

MR. JUSTICE DOUGLAS dissenting in part.

The business involved in the *Lichter* case relates to profits realized during the fiscal year ending December 31, 1942. As to the amounts owed under these contracts, petitioners are entitled to a hearing in the District Court. For Congress did not require that class of contracts to be taken to the Tax Court. I think a close reading of the statutes, contained in Appendix III to the Court's opinion, will bear me out.

Section 403 (e) (1) relates to orders of the Board and provides that they may be reviewed by the Tax Court. And § 403 (c) (1) provides that in the absence of the filing of such a petition with the Tax Court, the orders of the Board "shall be final and conclusive."

But we are concerned here not with orders of the Board but with an order of the Secretary. Section 403 (e) (2) provides that those orders, too, may be taken to the Tax Court. But § 403 (e) (2) by its terms makes inapplicable those provisions of the 1943 amendment which are not made applicable as of April 28, 1942, or to the fiscal years ending before July 1, 1943. Thus, § 403 (c) (6) limits subsection (c) "to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943." Hence it is clear that the provision of § 403 (c) (1) which makes the orders of the Board final and conclusive in absence of the filing of a petition with the Tax Court is not applicable here. Orders of the Secretary, at least as respects 1942 business, are therefore treated differently than orders of the Board. I conclude that the purpose was to leave contracts and contractors who fell in that category with the right of access to the courts which they had enjoyed prior to the Revenue Act of 1943. In those cases jurisdiction of the Tax Court may be invoked at the option of the petitioners.

Macauley v. *Waterman S. S. Corp.*, 327 U. S. 540, is not opposed to this conclusion. For that case involved an order of the Board. *Wade* v. *Stimson*, 331 U. S. 793, involved an order of the Secretary and related to 1942 business. But the question in issue here was not raised there, as it is not in *Alexander Wool Combing Co.* v. *United States*, decided this day.

LOFTUS *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 59. Argued April 26, 1948.—Decided June 14, 1948.

In the circumstances of this case, the cause is continued for an appropriate period to enable this Court to be advised without ambiguity whether the state supreme court intended to rest its judgment herein on an adequate independent state ground or whether decision of the claim of denial of federal constitutional right was necessary to the judgment rendered. Pp. 804–806.

Petitioner, by an original writ of error in the state supreme court, challenged the validity of four judgments of conviction in a circuit court of the State. The state supreme court affirmed the judgments. 395 Ill. 479, 70 N. E. 2d 573. This Court granted certiorari. 333 U. S. 831. *Cause continued,* pp. 805–806.

Henry H. Fowler argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett,* Attorney General.

PER CURIAM.

By way of an original writ of error in the Supreme Court of Illinois, petitioner challenged the validity of four convictions in a circuit court of that State. The Illinois Supreme Court affirmed the judgments, 395 Ill. 479, 70 N. E. 2d 573. We brought the case here, 333 U. S. 831, because of a serious claim that petitioner was denied the assistance of counsel under circumstances which constitute a disregard of the safeguards to which he was entitled under the Due Process Clause of the Fourteenth Amendment.

The Illinois Supreme Court disposed of this claim on the basis of the requirements of Illinois law. If the Illi-

nois decision was an adjudication of the rights to which the petitioner was entitled under the Due Process Clause, we would be constrained to hold that he had brought himself within our governing decisions. In his oral argument here, however, the Attorney General of the State insisted that the circumstances on which petitioner relies in claiming denial of a right under the United States Constitution were not properly before the Supreme Court of Illinois on the Illinois writ of error, but must be pursued in Illinois by *habeas corpus.* The Attorney General relies for his view of the local law upon two recent opinions of the Illinois Supreme Court, *People* v. *Wilson,* 399 Ill. 437, 78 N. E. 2d 514, and *People* v. *Shoffner,* 400 Ill. 174, 79 N. E. 2d 200. Both these opinions certainly recognize that the right to counsel of indigent accused may, under relevant circumstances, be part of the due process which the Fourteenth Amendment guarantees.

If, as a matter of local procedure, Illinois chooses to allow a federal right, such as the present record presents, to be vindicated by *habeas corpus* in its Illinois scope, but does not make available the Illinois writ of error, that is for Illinois to say and not for us to deny.

Even though our reading of the record and of Illinois law might give us a different understanding, we have had too great difficulty in ascertaining what is the appropriate Illinois procedure for raising claims of infringement of federal rights to reject the Attorney General's submission regarding Illinois procedural law. See, *e. g., Marino* v. *Ragen,* 332 U. S. 561. If the Attorney General is correct and petitioner sought to raise even a valid federal claim by way of an unavailable Illinois remedy, we have of course a judgment that rests on a non-federal ground, calling for dismissal of our writ. In this state of uncertainty, we follow our precedent in *Herb* v. *Pitcairn,* 324 U. S. 117. See also *Phyle* v. *Duffy,* 334 U. S. 431.

Accordingly, we shall continue this cause for an appropriate period to enable us to be advised without ambiguity

whether the Illinois Supreme Court intended to rest the judgment herein on an adequate independent state ground or whether decision of the claim under the Fourteenth Amendment was necessary to the judgment rendered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.

HEDGEBETH *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 674. Argued April 27, 1948.—Decided June 14, 1948.

1. The state supreme court having affirmed dismissal of a habeas corpus proceeding involving a claim of federal constitutional right on the ground that the full record was not before it, the writ of certiorari granted to review that judgment is dismissed because the judgment can rest on an adequate non-federal ground. P. 807.
2. A state prisoner's rights under the Federal Constitution must be pursued in accordance with the state procedure or, in default of relief by available state procedure, by a new claim of denial of federal right for want of such relief. P. 807.

228 N. C. 259, 45 S. E. 2d 563, certiorari dismissed.

Petitioner sued in a state court for habeas corpus to secure release from imprisonment under a conviction alleged to have denied his federal constitutional rights. A judgment dismissing the writ was affirmed by the state supreme court. 228 N. C. 259, 45 S. E. 2d 563. This Court granted certiorari. 333 U. S. 854. *Dismissed,* p. 807.

By special leave of Court, *Wilford L. Whitley, Jr., pro hac vice,* argued the cause and filed a brief for petitioner.

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *Harry McMullan,* Attorney General, and *T. W. Bruton,* Assistant Attorney General.

PER CURIAM.

After a conviction for robbery, petitioner sued out a writ of *habeas corpus* in a Superior Court of North Carolina claiming that the sentence he is serving involved a denial of his rights under the Fourteenth Amendment. The writ was dismissed and the dismissal affirmed by the Supreme Court of North Carolina. 228 N. C. 259, 45 S. E. 2d 563. If petitioner's allegations, with supporting affidavits, in the *habeas corpus* proceedings controlled the issue before us, they would establish circumstances that make the right to assistance of counsel an ingredient of the Due Process Clause. While the Supreme Court of North Carolina recognized the right of an accused to the benefit of counsel under appropriate circumstances, it held that in the proceedings on the *habeas corpus* the trial court had before it not merely the petitioner's allegations but "the oral testimony of the sheriff, which was not sent up." In short, there was before the North Carolina Supreme Court only a partial record of the proceedings in the Superior Court. In reviewing a judgment of a state court, we are bound by the record on which that judgment was based. Since the North Carolina Supreme Court went on the ground that it did not have the full record before it, we are constrained to dismiss this writ because the judgment below can rest on a non-federal ground. Petitioner's rights under the Federal Constitution must be pursued according to the procedural requirements of North Carolina or, in default of relief by available North Carolina proceedings, by a new claim of denial of due process for want of such relief. *Foster* v. *Illinois,* 332 U. S. 134, 139.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE are of the opinion that the judgment should be reversed.

DECISIONS PER CURIAM AND ORDERS FROM APRIL 27, 1948, THROUGH JUNE 21, 1948.

MAY 3, 1948.

Per Curiam Decisions.

No. 397. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS UNION ET AL. *v.* DENVER MILK PRODUCERS, INC. ET AL. Appeal from the Supreme Court of Colorado. Argued January 9, 1948. Decided May 3, 1948. *Per Curiam:* Because of the inadequacy of the record, we decline to decide the constitutional issues involved. The appeal is dismissed without prejudice to the determination in further proceedings of any questions arising under the Federal Constitution. Cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947). Dissenting: MR. JUSTICE BLACK and MR. JUSTICE MURPHY. *Herbert S. Thatcher* argued the cause for appellants. With him on the brief were *J. Albert Woll* and *Philip Hornbein, Jr. Kenneth W. Robinson* argued the cause and filed a brief for appellees. *Robert D. Charlton* was also of counsel. By special leave of Court, *George K. Thomas,* Assistant Attorney General, argued the cause for the State of Colorado, as *amicus curiae,* urging affirmance. With him on the brief was *H. Lawrence Hinkley,* Attorney General. Reported below: 116 Colo. 389, 183 P. 2d 529.

No. 733. SCHMITT *v.* WILDER, DIRECTOR OF LICENSING, ET AL. Appeal from the Supreme Court of South Dakota. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ashley Sellers* and *Kenneth L. Kimble* for appellant. *Ray F. Drewry,* Assistant Attorney General of South Dakota, for appellees. Reported below: 71 S. Dak. 575, 27 N. W. 2d 910.

No. 741. FINLEY ET AL. *v.* CITY OF TARRANT ET AL. Appeal from the Supreme Court of Alabama. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. MR. JUSTICE BLACK took no part in the consideration or decision of this case.. *George D. Finley* for appellants. *Douglass P. Wingo, Peyton D. Bibb* and *Needham A. Graham, Jr.* for appellees. Reported below: 250 Ala. 19, 32 So. 2d 806.

Miscellaneous Orders.

No. 337. CONNECTICUT MUTUAL LIFE INSURANCE CO. ET AL. *v.* MOORE, COMPTROLLER OF THE STATE OF NEW YORK, 333 U. S. 541. Rehearing denied. The petitions of the States of Connecticut and Vermont for leave to intervene are therefore also denied.

No. 361, Misc. DAVIS *v.* NIERSTHEIMER, WARDEN; and No. 469, Misc. FOOK *v.* CLEMMER, DIRECTOR. The motions for leave to file petitions for writs of habeas corpus are denied.

Certiorari Granted.

No. 621. UNITED STATES *v.* KANSAS CITY LIFE INSURANCE CO. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Ray B. Lucas* for respondent. Reported below: 109 Ct. Cl. 555, 74 F. Supp. 653.

No. 195, Misc. YOUNG *v.* RAGEN, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari granted. Petitioner *pro se.* *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

Certiorari Denied.

No. 611. Loew's, Inc. et al. *v.* William Goldman Theatres, Inc. C. C. A. 3d. Certiorari denied. *Wm. A. Schnader, Bernard G. Segal, J. Pennington Straus, Joseph M. Proskauer* and *Louis J. Goffman* for petitioners. *William A. Gray, Francis T. Anderson, Lester J. Schaffer* and *Robert Dechert* for respondent. Reported below: 164 F. 2d 1021.

No. 642. New York, New Haven & Hartford Railroad Co. *v.* Reconstruction Finance Corporation. C. C. A. 2d. Certiorari denied. *Hermon J. Wells* and *H. H. Corbin* for petitioner. *Solicitor General Perlman, Robert L. Stern, Robert W. Ginnane, W. Meade Fletcher* and *Joseph A. Woolman* for respondent. Reported below: 164 F. 2d 466.

No. 663. United States *v.* Cold Metal Process Co. et al. C. C. A. 6th. Certiorari denied. *Solicitor General Perlman* for the United States. *Clarence B. Zewadski* and *Howard F. Burns* for respondents. Reported below: 164 F. 2d 754.

No. 682. Harang *v.* United States. C. C. A. 5th. Certiorari denied. *Arthur A. Moreno* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Hilbert P. Zarky* for the United States. Reported below: 165 F. 2d 106.

No. 688. Beavers *v.* Commissioner of Internal Revenue. C. C. A. 5th. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Hilbert P. Zarky* for respondent. Reported below: 165 F. 2d 208.

No. 698. In re Gordon. Supreme Court of California. Certiorari denied. *David W. Louisell* for petitioner.

No. 699. CAPITOL MEATS, INC. ET AL. *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Irving J. Roth* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 166 F. 2d 537.

No. 714. SCHATTE ET AL. *v.* INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE OPERATORS ET AL. C. C. A. 9th. Certiorari denied. *Zach Lamar Cobb* for petitioners. *Matthew M. Levy* and *Michael G. Luddy* for the International Alliance of Theatrical Stage Employees & Moving Picture Operators et al.; and *Homer I. Mitchell* for the Association of Motion Picture Producers, Inc. et al., respondents. Reported below: 165 F. 2d 216.

No. 686. SAMETT *v.* RECONSTRUCTION FINANCE CORPORATION. C. C. A. 10th. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Fred S. Caldwell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Harry I. Rand* for respondent. Reported below: 165 F. 2d 605.

No. 694. WAITE *v.* OVERLADE, WARDEN. C. C. A. 7th. Certiorari denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion the petition should be granted. *Benjamin G. Cox* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Frederick Bernays Wiener, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 164 F. 2d 722.

No. 307, Misc. HARRISON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 395 Ill. 463, 70 N. E. 2d 596.

No. 421, Misc. MACK *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied. (*See also No. 337, supra.*)

No. 270. PARKER *v.* ILLINOIS, 333 U. S. 571. Rehearing denied.

No. 384. COMMISSIONER OF INTERNAL REVENUE *v.* SOUTH TEXAS LUMBER CO., 333 U. S. 496. Rehearing denied.

No. 579. GARLAND *v.* UNITED STATES, 333 U. S. 861. Rehearing denied.

MAY 10, 1948.

Per Curiam Decisions.

No. 153. TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST ET AL. *v.* PERKINS ET AL. On petition for writ of certiorari to the Supreme Court of Ohio. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Shelley* v. *Kraemer* and *McGhee* v. *Sipes,* 334 U. S. 1. MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Leon A. Ransom* and *Austin L. Fickling* for petitioners. Reported below: 147 Ohio St. 537, 72 N. E. 2d 97.

No. 429. AMER *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES; and

No. 430. KIM *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES. On petition for writs of certiorari to the Supreme Court of California. *Per Curiam:* The petition for writs of certiorari is granted. In each case the order denying a petition for writ of prohibition is vacated and the case is remanded to the Su-

preme Court of California in order to enable it to reconsider its ruling in the light of *Shelley* v. *Kraemer* and *McGhee* v. *Sipes*, 334 U. S. 1. MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases. *A. L. Wirin* and *Fred Okrand* for petitioners. *Harold L. Kennedy, Ray C. Eberhard* and *Elisabeth Eberhard Zeigler* for respondent. *Saburo Kido* filed a brief for the Japanese American Citizens League, as *amicus curiae*, supporting the petition.

No. 700. GAMBRELL ET AL. *v.* CHALK HILL THEATRE CO., LTD. ET AL. Appeal from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. *Everett L. Looney* for appellants. *Arthur P. Bagby* for the Chalk Hill Theatre Co., Ltd.; *James H. Hart* for the City of Austin; and *James P. Hart* for Staehely, appellees. Reported below: 205 S. W. 2d 126.

No. 745. JEFFERSON COUNTY BOARD OF EDUCATION ET AL. *v.* EVERETT, SUPERINTENDENT. Appeal from the Court of Appeals of Kentucky. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Henry M. Johnson* for appellants. Reported below: 306 Ky. 439, 207 S. W. 2d 567.

Certiorari Granted. (*See Nos. 153, 429 and 430, supra.*)

Miscellaneous Order.

No. 258. SCHWABACHER ET AL. *v.* UNITED STATES ET AL. Order entered amending opinion.

Opinion reported as amended, 334 U. S. 182.

Certiorari Denied.

No. 591. RODD *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Morris L. Ernst, Harriet F. Pilpel* and *A. L. Wirin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Frederick Bernays Wiener, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 165 F. 2d 54.

No. 672. KRIEGER *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 212 La. 527, 33 So. 2d 58.

No. 687. NEBRASKA *v.* UNITED STATES ET AL. C. C. A. 8th. Certiorari denied. *Walter R. Johnson,* Attorney General of Nebraska, *C. S. Beck,* Deputy Attorney General, and *Robert A. Nelson,* Assistant Attorney General, for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for the United States; and *Milton C. Murphy* and *Paul L. Martin* for McNish et al., respondents. Reported below: 164 F. 2d 866.

No. 708. SOBEL CORRUGATED & WOODEN BOX CO. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. C. C. A. 6th. Certiorari denied. *A. L. Kearns* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 165 F. 2d 568.

No. 715. TINSLEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Kenneth Lawing* for petitioner. Reported below: — Tex. Cr. R. —, 207 S. W. 2d 94.

No. 728. NORTH PIER TERMINAL CO. *v.* INTERSTATE COMMERCE COMMISSION. C. C. A. 7th. Certiorari denied. *John S. Burchmore, Nuel D. Belnap* and *Robert N.*

Burchmore for petitioner. *Solicitor General Perlman, Assistant Attorney General Sonnett, Edward Dumbauld, Daniel W. Knowlton* and *Gordon Locke* for respondent. Reported below: 164 F. 2d 640.

No. 739. AUGELLI, TRUSTEE IN BANKRUPTCY, ET AL. *v.* OHIO FINANCE CORP.; and

No. 740. AUGELLI, TRUSTEE IN BANKRUPTCY, ET AL. *v.* OHIO FINANCE CORP. C. C. A. 3d. Certiorari denied. *Samuel Milberg* and *Benjamin Gross* for petitioners. *Nathan Bilder* for respondent. Reported below: 165 F. 2d 788.

No. 759. FRANKLIN LIFE INSURANCE CO. *v.* STUART ET AL. C. C. A. 5th. Certiorari denied. *C. K. Bullard* for petitioner. *Dan Moody* for respondents. Reported below: 165 F. 2d 965.

No. 681. VIOLA *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Charles J. Margiotti* for petitioner. *Paul J. Reagen* and *William M. McLain* for respondent. Reported below: 148 Ohio St. 712, 76 N. E. 2d 715.

Rehearing Denied.

No. 518. DINEEN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, *v.* UNITED STATES, 333 U. S. 842. Rehearing denied.

MAY 17, 1948.

Per Curiam Decisions.

No. 428. PARKER *v.* ILLINOIS. Certiorari, 332 U. S. 846, to the Supreme Court of Illinois. Argued February 13, 1948. Decided May 17, 1948. *Per Curiam:* MR. JUSTICE JACKSON is of the opinion that the writ of certiorari should be dismissed and did not participate in the

question as to the disposition of the case on its merits. With respect to the merits the judgment is affirmed by an equally divided Court. Petitioner argued the cause and filed a brief *pro se*. *William C. Wines,* Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett,* Attorney General. Reported below: 397 Ill. 305, 74 N. E. 2d 523.

No. 705. Burrows et vir *v.* Hagerman, Tax Collector of Sarasota County, et al. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Stewart* v. *Pennsylvania,* 312 U. S. 649. *Richard J. Mackey* for appellants. *Miller Walton* and *W. C. Lantaff* for appellees. Reported below: 159 Fla. 826, 33 So. 2d 34.

Miscellaneous Orders.

No. 439, Misc. Kissinger *v.* Sweigert, District Judge. Motion of petitioner for leave to withdraw the motion for leave to file petition for writ of quo warranto granted.

No. 340, Misc. Mezo *v.* Nierstheimer, Warden;
No. 417, Misc. Orr *v.* Benson, Warden;
No. 423, Misc. Spencer *v.* Ragen, Warden;
No. 425, Misc. Thomas *v.* Hunter, Warden;
No. 433, Misc. Miller *v.* Stewart, Warden;
No. 434, Misc. Schunke *v.* Heinze, Warden;
No. 445, Misc. Henderson *v.* Howard, Warden;
No. 465, Misc. La Count *v.* Howard, Warden;
No. 467, Misc. Walker *v.* Maryland; and
No. 472, Misc. Greco *v.* Stewart, Warden. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 440, Misc. CREBS *v.* SUPREME COURT OF KANSAS. Motion for leave to file petition for writ of mandamus denied.

No. 461, Misc. TALL *v.* ILLINOIS. Application denied.

No. 479, Misc. IN RE O'NEILL. Motion for leave to file petition for writ of mandamus denied.

No. 484, Misc. LAPKA *v.* UNITED STATES. Application denied.

Certiorari Granted.

No. 732. KLAPPROTT *v.* UNITED STATES. C. C. A. 3d. Certiorari granted. *P. Bateman Ennis, W. Clifton Stone* and *Morton Singer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 166 F. 2d 273.

Certiorari Denied.

No. 623. DELANO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Frank L. Blackman* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *H. H. Warner* and *Daniel J. O'Hara,* Assistant Attorneys General, for respondent. Reported below: 318 Mich. 557, 28 N. W. 2d 909.

No. 661. RANDOLPH ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL.; and

No. 711. MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. *v.* RANDOLPH ET AL. C. C. A. 8th. Certiorari denied. *Clif Langsdale* and *Clyde Taylor* for petitioners in No. 661. *C. S. Burg, M. E. Clinton* and *Ellison A. Neel* for petitioners in No. 711 and respondents in No. 661. *R.*

Carter Tucker for Wood et al., respondents in Nos. 661 and 711. Reported below: 164 F. 2d 4.

No. 696. GUINNESS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ellsworth C. Alvord* and *Floyd F. Toomey* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Sewall Key* for the United States. Reported below: 109 Ct. Cl. 84, 73 F. Supp. 119.

No. 709. TUDRYCK ET UX. *v.* MARTIN, RECEIVER, ET AL.; and

No. 710. SMYL ET UX. *v.* MARTIN, RECEIVER, ET AL. Supreme Court of Michigan. Certiorari denied. *Harry J. Lippman* for petitioners in No. 709. *Robert C. Winter* for petitioners in No. 710. *Edward A. Bilitzke* for respondents. Reported below: 320 Mich. 99, 30 N. W. 2d 518.

Nos. 716 and 717. HAZELTINE CORPORATION *v.* KIRKPATRICK, U. S. DISTRICT JUDGE. C. C. A. 3d. Certiorari denied. *Arthur G. Connolly, Leonard A. Watson* and *Laurence B. Dodds* for petitioner. *Floyd H. Crews, Donald J. Overocker, Hugh M. Morris, S. Samuel Arsht* and *Charles M. Hogan* for respondent. Reported below: 165 F. 2d 683.

No. 720. COMMISSIONER OF INTERNAL REVENUE *v.* LEHMAN. C. C. A. 2d. Certiorari denied. *Solicitor General Perlman* for petitioner. *Ellsworth C. Alvord* and *Floyd F. Toomey* for respondent. Reported below: 165 F. 2d 383.

No. 725. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 726. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 7th. Certiorari denied. *Matthias*

Concannon for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Robert N. Anderson* and *Harry Baum* for respondent. Reported below: 164 F. 2d 870.

No. 742. CONSOLIDATED GOLDACRES CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 10th. Certiorari denied. *Frazer Arnold* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *S. Walter Shine* for respondent. Reported below: 165 F. 2d 542.

No. 743. COHEN, FRIEDLANDER & MARTIN CO. *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. C. C. A. 6th. Certiorari denied. *George R. Effler* for petitioner. *Ross W. Shumaker* for respondent. Reported below: 166 F. 2d 63.

No. 744. TROSCLAIR *v.* STANOLIND OIL & GAS CO. ET AL. C. C. A. 5th. Certiorari denied. *O. R. McGuire* for petitioner. *Richard B. Montgomery* for respondents. Reported below: 166 F. 2d 229.

No. 690. MILLER *v.* UNITED STATES ET AL. C. C. A. 2d. Certiorari denied. Petitioner *pro se. Solicitor General Perlman* for the United States; *Hugh M. Alcorn* for the Town of Suffield; and *Charles Welles Gross* for the Suffield Savings Bank, respondents.

No. 712. CURTISS CANDY CO. *v.* CLARK, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Turney substituted for Clark as the party respondent. Certiorari denied. *Irwin N. Walker* and *Peter B. Atwood* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 165 F. 2d 791.

No. 727. GHADIALI ET AL. *v.* UNITED STATES. C. C. A. 3d. Certiorari denied. Petitioners *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 165 F. 2d 957.

No. 248, Misc. STARKS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 395 Ill. 567, 71 N. E. 2d 23.

No. 333, Misc. HAWKS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 281, 75 N. E. 2d 686.

No. 334, Misc. PEABODY *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 370, Misc. NELSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 623, 76 N. E. 2d 441.

No. 371, Misc. BERRY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 399 Ill. 17, 76 N. E. 2d 443.

No. 374, Misc. EXKANO *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Frederick Bernays Wiener, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 165 F. 2d 435.

No. 375, Misc. MCDOWELL *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Rob-*

ert S. Erdahl and *Joseph M. Howard* for the United States.

No. 403, Misc. DANIELS *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 414, Misc. HOLIDAY *v.* SWENSON, WARDEN. Criminal Court of Baltimore, Maryland. Certiorari denied.

No. 419, Misc. HASENFUSS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 297 N. Y. 779, 77 N. E. 2d 792.

No. 422, Misc. PUTNAM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 421, 76 N. E. 2d 183.

No. 424, Misc. BAILEY *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 427, Misc. MINOR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 428, Misc. BAUGH *v.* RAGEN, WARDEN. Circuit Court of Madison County, Illinois. Certiorari denied.

No. 435, Misc. HABIGHORST *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 212 La. 723, 33 So. 2d 411.

No. 436, Misc. HENRY *v.* BALDI, SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 442, Misc. HARPSTRITH *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 443, Misc. SMITH *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 458, Misc. DE BERRY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 460, Misc. BOONE *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied. Reported below: 355 Mo. 550, 196 S. W. 2d 794.

No. 468, Misc. BARONIA *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 471, Misc. HATZIS *v.* NEW YORK. Appellate Division of the Supreme Court of New York. Certiorari denied. Reported below: See 297 N. Y. 163, 77 N. E. 2d 385.

No. 474, Misc. MCNAUGHTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 481, Misc. NELSON *v.* RAGEN, WARDEN. Circuit Court of Knox County, Illinois. Certiorari denied.

No. 482, Misc. REYNOLDS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 483, Misc. SCHECTMAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Department. Certiorari denied. Reported below: 266 App. Div. 1019, 44 N. Y. S. 2d 841.

No. 486, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 297 N. Y. 882, 79 N. E. 2d 278.

No. 488, Misc. JOHNSON *v.* INDIANA. Criminal Court of Lake County, Indiana. Certiorari denied.

No. 494, Misc. SIMMONS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 496, Misc. KALLAS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 367, Misc. DAVIS *v.* RAGEN, WARDEN. The petition for writ of certiorari to the Circuit Court of Rock Island County, Illinois, and the motions for other relief are denied.

Rehearing Denied.

No. 326, Misc. O'LOUGHLIN *v.* PARKER, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, 333 U. S. 869. Rehearing denied.

MAY 18, 1948.

Miscellaneous Order.

No. 512, Misc. EVERETT *v.* TRUMAN, COMMANDER IN CHIEF OF THE ARMED FORCES OF THE UNITED STATES, ET AL. The Court met in Special Term pursuant to a call by THE CHIEF JUSTICE having the approval of all the Associate Justices. The motion for leave to file a petition for an original writ of habeas corpus for relief from sentences upon the verdicts of a General Military Government Court at Dachau, Germany, is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States*, 332 U. S. 789 (1947); *Brandt* v. *United States*, 333 U. S.

836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that the motion for leave to file the petition should be granted and that the case should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of the motion. *Willis M. Everett, Jr. pro se.*

MAY 24, 1948.

Per Curiam Decision.

No. 754. REDDING *v.* LOS ANGELES ET AL. Appeal from the District Court of Appeal, 2d Appellate District, of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Morris Lavine* for appellant. *Ray L. Chesebro* and *Bourke Jones* for appellees. Reported below: 81 Cal. App. 2d 888, 185 P. 2d 430.

Miscellaneous Orders.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. Motion of the Campo Band of Indians and others for leave to intervene denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Attorney General Clark, Solicitor General Perlman, Assistant Attorney General Vanech, Arnold Raum, Stanley M. Silverberg, J. Edward Williams, Robert E. Mulroney* and *Robert M. Vaughan* for the United States. *Fred N. Howser,* Attorney General, and *Everett W. Mattoon,* Assistant Attorney General, for the State of California. *Norman M. Littell* and *Katherine M. Littell* for the Campo Band of Indians et al.

No. 408. TRUST OF ANDRUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 332 U. S. 842. Motion to extend the time within which to file petition for rehearing denied.

No. 497, Misc. WHITE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

No. 502, Misc. LOWE *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 386, Misc. IN RE KRAUTWURST;
No. 390, Misc. RIEKE *v.* UNITED STATES;
No. 411, Misc. IN RE KIWITT;
No. 430, Misc. IN RE HOVEN;
No. 437, Misc. IN RE HELLENBROICH;
No. 438, Misc. IN RE PIORKOWSKI;
No. 446, Misc. IN RE GOSS;
No. 455, Misc. IN RE FIRMENICH;
No. 456, Misc. IN RE SEILER;
No. 457, Misc. IN RE HUNSICKER;
No. 463, Misc. IN RE GIRKE; and
No. 478, Misc. IN RE KUNZE. Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motions for leave to file should be granted and that the cases should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 493, Misc. KRUSE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

Certiorari Granted.

No. 756. FISHER *v.* PACE, SHERIFF. Supreme Court of Texas. Certiorari granted. *Dan Moody, Chas. L. Black, Everett L. Looney* and *Edward Clark* for petitioner. *Quentin Keith* for respondent. Reported below: 146 Tex. 328, 206 S. W. 2d 1000.

Certiorari Denied. (*See also No. 493, supra.*)

No. 644. WETZEL *v.* SCHAEFER. C. C. A. 5th. Certiorari denied. Reported below: 164 F. 2d 483.

No. 697. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. C. A. 3d. Certiorari denied. *Edwin Hall, 2d* and *Harry J. Alker, Jr.* for petitioners. *Norris C. Bakke* and *John L. Cecil* for respondent. Reported below: 163 F. 2d 123, 164 F. 2d 469.

No. 706. CONE *v.* WEST VIRGINIA PULP & PAPER CO. C. C. A. 4th. Certiorari denied. *H. Wayne Unger* and *W. J. McLeod, Jr.* for petitioner. *Christie Benet, J. B. S. Lyles* and *Charles W. Waring* for respondent.

No. 713. UNITED STATES *v.* SUNSWICK CORPORATION. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Edgar A. B. Spencer* for respondent. Reported below: 109 Ct. Cl. 772, 75 F. Supp. 221.

No. 718. GARLINGTON ET AL. *v.* WASSON ET AL. C. C. A. 5th. Certiorari denied. *Elmer McClain* and *William Lemke* for petitioners. *Clyde E. Thomas* for respondents. Reported below: 164 F. 2d 243.

No. 724. GOODWIN ET AL., DOING BUSINESS AS BEN E. GOODWIN CO., *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. *W. L. Cunningham* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 165 F. 2d 334.

No. 738. ARKANSAS OAK FLOORING CO. ET AL. *v.* LOUISIANA & ARKANSAS RAILWAY CO. C. C. A. 5th. Certiorari denied. *Nicholas J. Gantt, Jr.* for petitioners. *T. W. Holloman, A. L. Burford, Joseph R. Brown* and *William E. Davis* for respondent. Reported below: 166 F. 2d 98.

No. 751. HURLEY ET AL. *v.* LOWE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FEDERAL SECURITY AGENCY, ET AL. United States Court of Appeals for the District of Columbia. Certiorari denied. *Al. Philip Kane* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for Lowe, Deputy Commissioner; and *Daniel W. O'Donoghue, Jr.* for the Globe Indemnity Co., respondents. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 553.

No. 758. QUIGLEY ET AL. *v.* PUBLIC SERVICE COMMISSION ET AL. Court of Appeals of Maryland. Certiorari denied. *Louis B. Arnold, William A. Roberts* and *Francis J. Ortman* for petitioners. *S. Ralph Warnken* and *Homer S. Carpenter* for the Public Service Commission et al.; and *Edmund L. Jones, F. G. Awalt, Raymond Sparks* and *Daryal A. Myse* for the Capital Transit Co., respondents. Reported below: — Md. —, 56 A. 2d 835.

No. 767. BAUMER FOODS, INC. *v.* GRIFFITH. C. C. A. 9th. Certiorari denied. *Harry Ellsworth Foster* for petitioner. *Thos. L. O'Leary* for respondent. Reported below: 166 F. 2d 433.

No. 778. New Amsterdam Casualty Co. et al. *v.* Craighead Rice Milling Co. C. C. A. 8th. Motion of respondent to supplement the record denied. Certiorari also denied. *Lowell W. Taylor* and *Arthur L. Adams* for petitioners. *Charles Frierson* for respondent. Reported below: 167 F. 2d 96.

No. 227, Misc. Schuman *v.* Heinze, Warden. Supreme Court of California. Certiorari denied.

No. 306, Misc. McGough *v.* United States. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 166 F. 2d 142.

No. 338, Misc. Rockower *v.* New York. Appellate Division of the Supreme Court of New York. Certiorari denied. Reported below: 78 N. Y. S. 2d 767.

No. 385, Misc. Rheim *v.* New York. Appellate Division of the Supreme Court of New York, First Department. Certiorari denied.

No. 387, Misc. Sanders *v.* Johnston, Warden. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 165 F. 2d 736.

No. 401, Misc. De Stubner *v.* United Carbon Co. et al. C. C. A. 4th. Certiorari denied. *Staige Davis* for petitioner. *Donald O. Blagg* and *A. G. Stone* for respondents. Reported below: 163 F. 2d 735.

No. 410, Misc. Scott *v.* Johnston, Warden. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor*

General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl and *Joseph M. Howard* for respondent. Reported below: 165 F. 2d 216.

No. 489, Misc. ALLEN *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 192 P. 2d 289.

No. 501, Misc. SMITH *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 505, Misc. HEARD *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 506, Misc. HOWARD *v.* CIRCUIT COURT OF WILL COUNTY, ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

Rehearing Denied.

No. 609. FULL SALVATION UNION ET AL. *v.* PORTAGE TOWNSHIP, 333 U. S. 851. Rehearing denied.

No. 617. BLAIR *v.* UNITED STATES ET AL., 333 U. S. 880. Rehearing denied.

No. 680. MCRAE *v.* WOODS, HOUSING EXPEDITER, 333 U. S. 882. Rehearing denied.

No. 304, Misc. SPRUILL *v.* CAMPBELL, EXECUTOR, 333 U. S. 864. Rehearing denied.

JUNE 1, 1948.

Miscellaneous Orders.

No. 10. SCHINE CHAIN THEATRES, INC. ET AL. *v.* UNITED STATES, *ante*, p. 110. Petition for clarification de-

nied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 303, Misc. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Solicitor General Perlman, Assistant Attorney General Sonnett, Leonard J. Emmerglick, Robert L. Stern, Kenneth L. Kimble* and *Horace H. Robbins* for the United States.

No. 490, Misc. IN RE BODENMILLER. Motion for leave to file petition for writ of mandamus denied.

No. 528, Misc. IN RE PIERCE. Petition denied.

Certiorari Granted.

No. 757. NATIONAL LABOR RELATIONS BOARD *v.* STOWE SPINNING CO. ET AL. C. C. A. 4th. Certiorari granted. *Solicitor General Perlman* for petitioner. *Paul C. Whitlock* for respondents. Reported below: 165 F. 2d 609.

Certiorari Denied.

No. 676. STOWE SPINNING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 4th. Certiorari denied. *Paul C. Whitlock* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 165 F. 2d 609.

No. 730. FOREIGN TRADE MANAGEMENT CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Dean Hill Stanley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A.*

Sweeney and *Harry I. Rand* for the United States. Reported below: 110 Ct. Cl. 23, 74 F. Supp. 550.

No. 731. Foreign Trade Management Co., Inc. *v.* United States. Court of Claims. Certiorari denied. *Dean Hill Stanley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Harry I. Rand* for the United States. Reported below: 109 Ct. Cl. 587, 74 F. Supp. 552.

No. 746. Ross *v.* United States. Court of Claims. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Arnold Raum, Sewall Key* and *Robert N. Anderson* for the United States. 110 Ct. Cl. 190, 75 F. Supp. 725.

No. 752. Gill et al. *v.* Mesta Machine Co. C. C. A. 3d. Certiorari denied. Petitioners *pro se. John C. Bane, Jr.* for respondent. Reported below: 165 F. 2d 785.

No. 755. Clements *v.* Cleveland & Chicago Motor Express Co. C. C. A. 7th. Certiorari denied. *Royal W. Irwin* for petitioner. *John R. Montgomery* for respondent.

No. 763. Jowers et al. *v.* Dowell, Inc. C. C. A. 5th. Certiorari denied. *Leonard Lloyd Lockard* for petitioners. *Val Irion* for respondent. Reported below: 166 F. 2d 214.

No. 764. Downs *v.* Commissioner of Internal Revenue. C. C. A. 9th. Certiorari denied. *Robert A. Waring* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Helen Goodner* for respondent. Reported below: 166 F. 2d 504.

No. 765. HOOFNEL *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 9th. Certiorari denied. *Robert A. Waring* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Helen Goodner* for respondent. Reported below: 166 F. 2d 504.

No. 768. SCHNELL ET AL., DOING BUSINESS AS H. SCHNELL & CO., *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Joseph Joffe* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade, Leavenworth Colby* and *Morton Hollander* for the United States. Reported below: 166 F. 2d 479.

No. 770. PORTER ROYALTY POOL, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 6th. Certiorari denied. *John C. Evans* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Hilbert P. Zarky* for respondent. Reported below: 165 F. 2d 933.

No. 771. GLENS FALLS INDEMNITY CO. *v.* BASICH BROTHERS CONSTRUCTION CO. C. C. A. 9th. Certiorari denied. *John E. McCall* and *Albert Lee Stephens, Jr.* for petitioner. *Karl B. Rodi* for respondent. Reported below: 165 F. 2d 649.

No. 790. LITTLETON *v.* RUST ET AL. C. C. A. 4th. Certiorari denied. *Robert H. McNeill* and *T. Bruce Fuller* for petitioner. Reported below: 166 F. 2d 1007.

No. 810. TINKOFF *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION ET AL. Supreme Court of Illinois. Certiorari denied. The motion for a stay also denied. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Ode L. Rankin* for petitioner. Reported below: 399 Ill. 282, 77 N. E. 2d 693.

No. 373, Misc. FREDERICKSEN *v.* DICKSON, ACTING WARDEN. Supreme Court of Nebraska. Jones, Warden, substituted as the party respondent. Certiorari denied. Reported below: 148 Neb. 739, 29 N. W. 2d 334.

No. 409, Misc. MORRISON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Department. Certiorari denied. Reported below: 77 N. Y. S. 2d 145.

No. 412, Misc. VIRGIN *v.* UNITED STATES. C. C. A. 4th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Oscar H. Davis* for the United States. Reported below: 165 F. 2d 81.

No. 416, Misc. MONTGOMERY ET AL. *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. *Donald H. Latshaw* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 165 F. 2d 196.

No. 426, Misc. MILLER *v.* BROWNING STEAMSHIP CO. C. C. A. 2d. Certiorari denied. *Thomas C. Burke* for petitioner. *Sparkman D. Foster* and *Laurence E. Coffey* for respondent. Reported below: 165 F. 2d 209.

No. 477, Misc. WATKINS *v.* INDIANA. Criminal Court of Lake County, Indiana. Certiorari denied.

No. 543, Misc. IN RE ADAMSON. C. C. A. 9th. Certiorari denied. The application for a stay of execution is also denied. *Morris Lavine* for petitioner. Reported below: 167 F. 2d 996.

Rehearing Denied.

No. 75. MANDEVILLE ISLAND FARMS, INC. ET AL. *v.* AMERICAN CRYSTAL SUGAR CO., *ante*, p. 219. Rehearing denied.

No. 638. MELLON *v.* UNITED STATES, 333 U. S. 873. Rehearing denied.

No. 663. UNITED STATES *v.* COLD METAL PROCESS CO. ET AL., *ante*, p. 811. Rehearing denied.

No. 671. CARGILL, INC. *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., 333 U. S. 880. Rehearing denied.

No. 685. BELZ *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., 333 U. S. 881. Rehearing denied.

No. 741. FINLEY ET AL. *v.* CITY OF TARRANT ET AL., *ante*, p. 810. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 162, Misc. PATTON *v.* BALDWIN LOCOMOTIVE WORKS, 332 U. S. 825. Motion for leave to file petition for rehearing denied.

JUNE 7, 1948.

Miscellaneous Orders.

No. 776. JUNGERSEN *v.* BADEN ET AL.;

No. 467. JUNGERSEN *v.* OSTBY & BARTON CO. ET AL.; and

No. 468. OSTBY & BARTON CO. ET AL. *v.* JUNGERSEN. In No. 776 the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. In Nos. 467 and 468 the motions for leave to file petitions for rehearing are granted and the petitions for rehearing

are granted. The orders entered January 12, 1948, denying certiorari, 332 U. S. 851, 852, are vacated and the petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit are granted. *William H. Davis* for petitioner in Nos. 467 and 776. *John Vaughan Groner* for petitioners in No. 468 and respondents in No. 467. Reported below: Nos. 467 and 468, 163 F. 2d 312; No. 776, 166 F. 2d 807.

No. 519, Misc. HARRIS *v.* CITY OF NEW YORK; and

No. 525, Misc. IN RE BANTZ. The applications are denied.

No. 526, Misc. IN RE EHLEN ET AL.; and

No. 527, Misc. IN RE GIRKE ET AL. Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motions for leave to file should be granted and that the cases should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

Certiorari Granted. (*See also Nos. 467, 468 and 776, supra.*)

No. 201, Misc. UVEGES *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari granted.

No. 503, Misc. HARRIS *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari granted. It is further ordered that execution of the sentence of death imposed on this petitioner be stayed pending the final disposition of the case by this Court. Reported below: 212 S. C. 124, 46 S. E. 2d 682.

Certiorari Denied.

No. 729. INTERSTATE CIRCUIT, INC. ET AL. *v.* TIVOLI REALTY, INC. C. C. A. 5th. Certiorari denied. *George S. Wright, Joe A. Worsham* and *Jos. Irion Worsham* for petitioners. *Abe Fortas* for respondent. Reported below: 167 F. 2d 155.

Nos. 734 and 735. C. D. JOHNSON LUMBER CORP. *v.* OREGON MESABI CORP.; and

Nos. 736 and 737. OREGON MESABI CORP. *v.* C. D. JOHNSON LUMBER CORP. C. C. A. 9th. Certiorari denied. *Robert S. Miller* for petitioner in Nos. 734 and 735 and respondent in Nos. 736 and 737. *John A. Laing* and *Henry S. Gray* for petitioner in Nos. 736 and 737 and respondent in Nos. 734 and 735. Reported below: 166 F. 2d 997, 1002, 1003.

No. 760. LOCKE *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Earle B. Mayfield* and *James S. Grisham* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Ellis N. Slack* for the United States. Reported below: 166 F. 2d 449.

No. 762. MARINITSIS *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. *James J. Laughlin* for petitioner. Reported below: 130 W. Va. 613, 45 S. E. 2d 733.

No. 774. TIME, INC. *v.* HARTMANN. C. C. A. 3d. Certiorari denied. *Wm. Dwight Whitney* and *Francis H. Scheetz* for petitioner. Reported below: 166 F. 2d 127.

No. 783. FLOYD *v.* RING CONSTRUCTION CORP. C. C. A. 8th. Certiorari denied. *Benedict Deinard* for petitioner. *Josiah E. Brill* for respondent. Reported below: 165 F. 2d 125.

No. 781. NEUMATICOS GOODYEAR, S. A., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Daniel James* and *Gustav B. Margraf* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 109 Ct. Cl. 535, 73 F. Supp. 969.

No. 769. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* SECURITIES & EXCHANGE COMMISSION. C. C. A. 2d. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Frank C. Bowers* for petitioner. *Solicitor General Perlman, Roger S. Foster, Sidney H. Willner* and *Solomon Freedman* for respondent. Reported below: 166 F. 2d 784.

No. 383, Misc. DWYER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 599, 74 N. E. 2d 882.

No. 420, Misc. PEEL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 441, Misc. BERRY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 459, Misc. WILSON *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn* and

Robert S. Erdahl for the United States. Reported below: 167 F. 2d 223.

Rehearing Granted. (*See Nos. 467 and 468, supra.*)

Rehearing Denied.

No. 23. FEDERAL TRADE COMMISSION *v.* CEMENT INSTITUTE ET AL.;

No. 24. FEDERAL TRADE COMMISSION *v.* AETNA PORTLAND CEMENT CO. ET AL.;

No. 26. FEDERAL TRADE COMMISSION *v.* CALAVERAS CEMENT CO. ET AL.;

No. 27. FEDERAL TRADE COMMISSION *v.* HURON PORTLAND CEMENT CO.;

No. 34. FEDERAL TRADE COMMISSION *v.* SMITH ET AL.;

No. 25. FEDERAL TRADE COMMISSION *v.* MARQUETTE CEMENT MANUFACTURING CO.;

No. 28. FEDERAL TRADE COMMISSION *v.* SUPERIOR PORTLAND CEMENT, INC.;

No. 29. FEDERAL TRADE COMMISSION *v.* NORTHWESTERN PORTLAND CEMENT CO.;

No. 30. FEDERAL TRADE COMMISSION *v.* RIVERSIDE CEMENT CO.;

No. 31. FEDERAL TRADE COMMISSION *v.* UNIVERSAL ATLAS CEMENT CO.; and

No. 32. FEDERAL TRADE COMMISSION *v.* CALIFORNIA PORTLAND CEMENT CO., 333 U. S. 683. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 219. MONTAGUE *v.* SMITH ET AL., 332 U. S. 767. Rehearing denied.

No. 693. LONDON EXTENSION MINING CO. *v.* COMMISSIONER OF INTERNAL REVENUE, 333 U. S. 881. Rehearing denied.

No. 428. PARKER *v.* ILLINOIS, *ante*, p. 816. Rehearing denied.

Statement by MR. JUSTICE JACKSON: "A litigant, apparently in good faith, raises objection to my participation in decision of his case, basing his objection upon statements which, if true, might reasonably lead him to believe himself justified in making the challenge. It seems appropriate to set the record straight.

"In applying for a rehearing petitioner says: 'Prior to his elevation to the Supreme Court of the United States, Justice Jackson was the general counsel for Mr. Terry Druggan. Mr. Weymouth Kirkland was the associate counsel with Justice Jackson in the large money affairs of Mr. Druggan.' He adds that he is informed that for these reasons I 'had succeeded in dividing the U. S. Supreme Court against this defenseless petitioner.'

"The facts are that I never have been general counsel or counsel of any character for any person named Terry Druggan, never to my knowledge saw or met such a person, do not know who he might be, where he resides or what his affairs consist of. Neither in this nor in any other matter was I ever associated professionally with Mr. Weymouth Kirkland, nor has he at any time communicated directly or indirectly with me concerning this case or any other matter pending in this or any other Court."

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE having voted to reverse the judgment of conviction, vote to grant the petition for rehearing.

No. 563. SIKORA REALTY CORP. *v.* WOODS, HOUSING EXPEDITER, 333 U. S. 855. Rehearing denied.

No. 226, Misc. TAURISANO *v.* NEW YORK, 332 U. S. 849. Rehearing denied.

No. 326, Misc. O'Loughlin *v.* Parker, Deputy Commissioner, U. S. Employees' Compensation Commission. Motion for leave to file a second petition for rehearing denied.

June 14, 1948.

Per Curiam Decision.

No. 320. Lincoln Electric Co. *v.* Forrestal, Secretary of National Defense, et al. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The judgment is affirmed. *Lichter* v. *United States, Pownall* v. *United States,* and *Alexander Wool Combing Co.* v. *United States, ante,* p. 742, decided this day. Mr. Justice Burton took no part in the consideration or decision of this case. *Ashley M. Van Duzer, Thomas V. Koykka* and *Charles Effinger Smoot* for appellant. *Solicitor General Perlman* for appellees. Reported below: 77 F. Supp. 444.

Miscellaneous Orders.

No. 490. Yarbrough, Executor, et al. *v.* Oklahoma Tax Commission. Appeal from the Supreme Court of Oklahoma. Judgment affirmed per stipulation of counsel to abide decision in *West* v. *Oklahoma Tax Comm'n, ante,* p. 717. *Frank T. McCoy, John R. Pearson* and *Frank Mahan* for appellants. *C. W. King* for appellee. Reported below: 200 Okla. —, 193 P. 2d 1017.

No. 491, Misc. Smith *v.* Hudspeth, Warden. Supreme Court of Kansas. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 162 Kan. 361, 176 P. 2d 262.

No. 529, Misc. Trimarco *v.* Ragen, Warden. Circuit Court of Will County, Illinois. Certiorari denied.

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Motion for leave to file petition for writ of habeas corpus also denied.

No. 243, Misc. DIDATO *v.* SHAW, DIRECTOR;
No. 507, Misc. TATE *v.* HEINZE, WARDEN;
No. 509, Misc. BAKER *v.* UTECHT, WARDEN;
No. 541, Misc. RUTHVEN *v.* OVERHOLSER, SUPERINTENDENT;
No. 544, Misc. GALLAWAY *v.* MICHIGAN;
No. 548, Misc. STOKER *v.* RAGEN, WARDEN; and
No. 566, Misc. PETRO *v.* HEINZE, WARDEN. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 364, Misc. MCCULLUM *v.* ILLINOIS. Application denied.

No. 480, Misc. MCCANN *v.* CLARK, ATTORNEY GENERAL. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for respondent.

No. 508, Misc. IN RE HUDSON. Petition denied.

No. 517, Misc. IN RE HULT. Motion for leave to file petition for writ of mandamus denied.

No. 538, Misc. FIFE *v.* RAGEN, WARDEN. Petition denied.

No. 545, Misc. WALKER *v.* MARYLAND. Petition denied.

Certiorari Granted.

No. 524, Misc. UPSHAW *v.* UNITED STATES. United States Court of Appeals for the District of Columbia.

Certiorari granted. *Joel D. Blackwell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *W. Marvin Smith* for the United States. Reported below: 168 F. 2d 167.

Certiorari Denied. (*See also Nos. 491, Misc., and 529, Misc., supra.*)

No. 77. Estate of Nathan *v.* Commissioner of Internal Revenue. C. C. A. 7th. Certiorari denied. *Myron E. Wisch* and *Louis R. Kupfer* for petitioner. *George T. Washington,* then Acting Solicitor General, *Sewall Key, Helen R. Carloss* and *L. W. Post* for respondent. Reported below: 159 F. 2d 546.

No. 592. Kentucky *v.* Illinois Central Railroad Co. Court of Appeals of Kentucky. Certiorari denied. *Eldon S. Dummit,* Attorney General of Kentucky, for petitioner. *Charles A. Helsell* and *V. W. Foster* for respondent. Reported below: 305 Ky. 632, 204 S. W. 2d 973.

No. 747. McRae *v.* California. Supreme Court of California. Certiorari denied. *Donald Eugene Wachhorst* for petitioner. Reported below: 31 Cal. 2d 184, 187 P. 2d 741.

No. 766. Barsky et al. *v.* United States. United States Court of Appeals for the District of Columbia. Certiorari denied. *O. John Rogge* and *Lester Levin* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Briefs of *amici curiae* supporting the petition were filed by *Harry Sacher* for the Civil Rights Congress; *Robert W. Kenny, Bartley C. Crum, Charles Houston, Charles Katz, Ben Margolis* and *Martin Popper* for Lawson et al.; *David Rein* for the

National Lawyers Guild; *Osmond K. Fraenkel, Arthur Garfield Hays, Benjamin H. Kizer* and *Perry J. Stearns* for the American Civil Liberties Union; *Joseph Forer* for the Southern Conference for Human Welfare; and *Arthur G. Silverman* for the International Longshoremen's & Warehousemen's Union et al. Reported below: 167 F. 2d 241.

No. 772. STEIN ET AL. *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 166 F. 2d 851.

No. 773. SINNOTT ET AL. *v.* SOUTH DAKOTA. Supreme Court of South Dakota. Certiorari denied. *Herbert S. Thatcher* for petitioners. *Ray F. Drewry,* Assistant Attorney General of South Dakota, for respondent. Reported below: 72 S. Dak. —, 30 N. W. 2d 455.

No. 777. LAND O' LAKES DAIRY CO. *v.* VILLAGE OF SEBEKA ET AL. Supreme Court of Minnesota. Certiorari denied. *M. J. Doherty* for petitioner. *J. A. A. Burnquist,* Attorney General of Minnesota, and *Geo. B. Sjoselius,* Deputy Attorney General, for respondents. Reported below: 225 Minn. 540, 31 N. W. 2d 660.

No. 779. SHAPERO *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 6th. Certiorari denied. *Thomas G. Long* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 165 F. 2d 811.

No. 784. WHITIN MACHINE WORKS *v.* REYNOLDS ET AL. C. C. A. 4th. Certiorari denied. *Newton A. Burgess* for petitioner. *John M. Robinson* and *Drury W. Cooper* for respondents. Reported below: 167 F. 2d 78.

No. 785. National Garment Co. *v.* National Labor Relations Board. C. C. A. 8th. Certiorari denied. *Charles H. Houston* and *Victor Packman* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 166 F. 2d 233.

No. 787. Trust Company of Chicago, Administrator, *v.* Erie Railroad Co. C. C. A. 7th. Certiorari denied. *Philip R. Davis* for petitioner. *Clyde E. Shorey* and *Frederic Barth* for respondent. Reported below: 165 F. 2d 806.

No. 788. Chick et al. *v.* Commissioner of Internal Revenue. C. C. A. 1st. Certiorari denied. *Robert A. B. Cook* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Lee A. Jackson* and *Helen Goodner* for respondent. Reported below: 166 F. 2d 337.

No. 791. Lily Ho Quon et al. *v.* Commissioner of Internal Revenue. C. C. A. 9th. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 165 F. 2d 215.

No. 794. Vail Manufacturing Co. *v.* National Labor Relations Board. C. C. A. 7th. Certiorari denied. *Kenneth G. Spaulding* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 158 F. 2d 664.

No. 795. Milwaukee Mechanics' Insurance Co. *v.* MacDonald et al., doing business as Elcar Coach. C. C. A. 7th. Certiorari denied. *Donald N. Clausen* and *Herbert W. Hirsh* for petitioner. Reported below: 167 F. 2d 276.

No. 798. ANDERSON *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO.; and

Nos. 799 and 800. COCA-COLA BOTTLING CO. *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. C. A. 4th. Certiorari denied. *C. Granville Wyche* and *Alfred F. Burgess* for petitioners. *J. A. Chambliss* and *C. F. Haynsworth, Jr.* for respondent. Reported below: 166 F. 2d 492.

No. 801. HOUGLAND *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 6th. Certiorari denied. *Chas. I. Dawson, A. Shelby Winstead* and *Bernard H. Barnett* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, A. F. Prescott* and *S. Dee Hanson* for respondent. Reported below: 166 F. 2d 815.

No. 809. GENERAL TIME INSTRUMENTS CORP. *v.* UNITED STATES TIME CORP. C. C. A. 2d. Certiorari denied. *W. Brown Morton* for petitioner. *John Vaughan Groner* and *Robert B. Whittredge* for respondent. Reported below: 165 F. 2d 853.

No. 814. PITTSBURGH-DES MOINES STEEL CO. ET AL. *v.* MORAN, ADMINISTRATRIX. C. C. A. 3d. Certiorari denied. *Carl E. Glock* for petitioners. *Marvin C. Harrison* for respondent. Reported below: 166 F. 2d 908.

No. 815. GEM JEWELRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *Harry Dow* for petitioner. Reported below: 165 F. 2d 991.

No. 842. VANNECK ET AL., TRUSTEES, *v.* SECURITIES & EXCHANGE COMMISSION ET AL.; and

No. 843. CAPLAN ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. C. A. 3d. Certiorari denied. *Percival E. Jackson, Terence J. McManus* and *Walter E.*

Ernst for petitioners. *Solicitor General Perlman, Roger S. Foster, Irwin L. Tappen* and *John C. Benson* for respondents. Reported below: 168 F. 2d 740.

No. 753. ROMNEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *William H. Collins* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 167 F. 2d 521.

No. 813. HUGGINS *v.* TOOMER ET UX. C. C. A. 4th. Motion to extend the time to serve printed papers denied. Certiorari also denied. Reported below: —— F. 2d ——.

No. 66, Misc. RICHARDSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 141, Misc. PALULIS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 254, Misc. HINES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 310, Misc. GRIMM *v.* NIERSTHEIMER, WARDEN. Circuit Court of Jefferson County, Illinois. Certiorari denied. Petitioner *pro se*. *George F. Barrett,* Attorney

General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 379, Misc. BENNETT *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *J. E. Taylor*, Attorney General of Missouri, and *Tyre W. Burton*, Assistant Attorney General, for respondent.

No. 418, Misc. MORTON *v.* WELCH, SUPERINTENDENT. C. C. A. 4th. Certiorari denied. Reported below: 162 F. 2d 840.

No. 429, Misc. RAWLS *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 166 F. 2d 532.

No. 431, Misc. KING *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. *Wm. J. Fanning* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 165 F. 2d 408.

No. 447, Misc. WILSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Harry C. Barron* for petitioner. Reported below: 399 Ill. 437, 78 N. E. 2d 514.

No. 448, Misc. WILLIS *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 166 F. 2d 721.

No. 449, Misc. BLOOM *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 450, Misc. KILL *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 451, Misc. GANN ET AL. *v.* MEEK. C. C. A. 5th. Certiorari denied. *Eustis Myres* for petitioners. *W. F. Moore* for respondent. *Solicitor General Perlman* filed a memorandum for the United States. Reported below: 165 F. 2d 857.

No. 452, Misc. KEMMERER *v.* BENSON, WARDEN. C. C. A. 6th. Certiorari denied. Reported below: 165 F. 2d 702.

No. 453, Misc. WARD *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 454, Misc. MOORE *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. Reported below: 166 F. 2d 102.

No. 462, Misc. BRICTSON *v.* WOODROUGH ET AL. C. C. A. 8th. Certiorari denied. *E. Luther Melin* for petitioner. Reported below: 164 F. 2d 107.

No. 464, Misc. HANSON *v.* RAGEN, WARDEN. C. C. A. 7th. Certiorari denied. *Zeamore A. Ader* for petitioner. Reported below: 166 F. 2d 608.

No. 470, Misc. DAVIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 83 U. S. App. D. C. —, 167 F. 2d 228.

No. 473, Misc. KELLY *v.* SQUIER, WARDEN. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor*

General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl and *Joseph M. Howard* for respondent. Reported below: 166 F. 2d 731.

No. 476, Misc. DIXON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 485, Misc. GRAY ET AL. *v.* BRACEY ET AL. Supreme Court of California. Certiorari denied. Reported below: 31 Cal. 2d 426, 189 P. 2d 3.

No. 487, Misc. WATSON *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Bart. A. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 166 F. 2d 1018.

No. 492, Misc. SHOCKLEY *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Joseph L. Alioto* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 166 F. 2d 704.

No. 495, Misc. THOMPSON *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Melvin M. Belli* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States.

No. 498, Misc. FAZIO ET AL. *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 499, Misc. THOMPSON *v.* NIERSTHEIMER, WARDEN. C. C. A. 7th. Certiorari denied. Reported below: 166 F. 2d 87.

No. 500, Misc. COLE ET AL. *v.* NEW JERSEY. Court of Errors and Appeals of New Jersey. Certiorari denied. *David W. Louisell, Carl McGowan, A. Warren Littman* and *Henry F. Schenk* for petitioners. *Duane E. Minard* for respondent. Reported below: 136 N. J. L. 606, 56 A. 2d 898.

No. 510, Misc. ODELL *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 513, Misc. CALDERBANK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 514, Misc. HOWELL *v.* JONES, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 515, Misc. JOHNSON *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 518, Misc. ASBELL *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 520, Misc. KALAN *v.* KALAN. Court of Appeals of New York. Certiorari denied. Reported below: 297 N. Y. —.

No. 521, Misc. REED *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 522, Misc. ROBINSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 523, Misc. ELLIOTT *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 164 Kan. 598, 191 P. 2d 900.

No. 530, Misc. McElligott *v.* Burke, Warden. Supreme Court of Pennsylvania. Certiorari denied.

No. 531, Misc. Beason *v.* Stewart, Warden. Supreme Court of Missouri. Certiorari denied.

No. 532, Misc. Lyle *v.* Stewart, Warden. Supreme Court of Missouri. Certiorari denied.

No. 533, Misc. Washington *v.* Ragen, Warden. Circuit Court of Will County, Illinois. Certiorari denied.

No. 534, Misc. Story *v.* Oklahoma. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 184 P. 2d 983.

No. 535, Misc. Meyers *v.* Ragen, Warden. Circuit Court of Will County, Illinois. Certiorari denied.

No. 536, Misc. Holloway *v.* United States. United States Court of Appeals for the District of Columbia. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 80 U. S. App. D. C. 3, 148 F. 2d 665.

No. 537, Misc. Jones *v.* Ragen, Warden. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 539, Misc. Brown *v.* Missouri. C. C. A. 8th. Certiorari denied.

No. 540, Misc. Lucas *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 211 S. W. 2d 222.

No. 542, Misc. FARNSWORTH *v.* MARYLAND. Supreme Bench of Baltimore City, Maryland. Certiorari denied.

No. 546, Misc. TURNER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 547, Misc. HAWLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 399 Ill. 300, 77 N. E. 2d 701.

No. 549, Misc. SHAFFER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 400 Ill. 332, 79 N. E. 2d 477.

No. 550, Misc. HAUGHEY *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. *William Alfred Hall, Jr.* for petitioner. Reported below: 187 Va. 320, 46 S. E. 2d 419.

No. 551, Misc. FARRELL *v.* LANAGAN, WARDEN. C. C. A. 1st. Certiorari denied. *Alfred A. Albert* for petitioner. Reported below: 166 F. 2d 845.

No. 553, Misc. HALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 161.

No. 554, Misc. GRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied for the reason that application therefor was not made within the time provided by law. Rule 37 (b) (2) of the Rules of Criminal Procedure. *James T. Wright* and *Wesley S. Williams* for petitioner. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 161.

No. 320, Misc. HILLIARD *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. Motions for other relief also denied.

Rehearing Denied.

No. 690. MILLER *v.* UNITED STATES ET AL., *ante*, p. 820. Rehearing denied.

No. 754. REDDING *v.* LOS ANGELES ET AL., *ante*, p. 825. Rehearing denied.

No. 306, Misc. MCGOUGH *v.* UNITED STATES, *ante*, p. 829. Rehearing denied.

JUNE 21, 1948.

Per Curiam Decisions.

No. 775. EUBANKS *v.* THOMPSON, RECEIVER. On petition for writ of certiorari to the Supreme Court of Arkansas. *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Supreme Court of Arkansas is reversed. See *Myers* v. *Reading Co.*, 331 U. S. 477 (1947) and *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649 (1947). *Walter M. Bastian* and *A. K. Shipe* for petitioner. Reported below: See 212 Ark. 652, 207 S. W. 2d 610; 208 S. W. 2d 161.

No. 808. NATIONAL MARITIME UNION OF AMERICA ET AL. *v.* HERZOG ET AL. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of § 9 (f) and § 9 (g) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 143; 29 U. S. C. §§ 141, 159 (f) 159 (g), Supp. 1947). We do not find it necessary to

reach or consider the validity of § 9 (h). MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set down for argument. *William L. Standard* and *David Rein* for appellants. *Solicitor General Perlman* for appellees. Reported below: 78 F. Supp. 146.

Miscellaneous Orders.

No. —, Original. WISCONSIN *v.* ILLINOIS. Motion for leave to file bill of complaint denied. *Massachusetts* v. *Missouri,* 308 U. S. 1. *John E. Martin,* Attorney General of Wisconsin, and *George I. Haight* for complainant. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for defendant.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. In our opinion of June 23, 1947, we stated that it might later become necessary to have hearings "in order to determine with greater definiteness particular segments of the boundary" between California and the marginal sea over which the United States has paramount rights and power (332 U. S. 19, 26). Our decree of October 27, 1947, reserved jurisdiction to enter such further orders and to issue such writs as might from time to time be necessary (332 U. S. 804, 805).

The Government has now filed a petition praying that the precise boundary as to certain segments of the California coastal area be ascertained. It urges that there exists a definite need for a prompt determination in this respect. California has answered, agreeing that there is need for prompt determination of the boundaries as to the segments designated by the Government, but it urges that there is also need for a prompt determination of the precise California coastal boundary all the way from Oregon to Mexico.

California's petition for an ascertainment of the entire coastal boundary at this time is denied.

The Court is in doubt at this time as to what particular segments of the boundary, if any, should now be determined.

It is therefore of the opinion that a master should be appointed by THE CHIEF JUSTICE to make inquiry into this subject and to hold hearings, if he finds it necessary, in order to make recommendations to this Court at the October, 1948, Term, as to what particular portions of the boundary call for precise determination and adjudication. Should the master conclude that such adjudications should be made, he is also authorized to recommend to this Court an appropriate procedure to be followed in determining the precise boundary of such segments.

It is so ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of this question.

Attorney General Clark, Solicitor General Perlman, Assistant Attorney General Vanech, Arnold Raum, Stanley M. Silverberg, J. Edward Williams, Robert E. Mulroney, Hugh F. O'Donnell and *Robert M. Vaughan* for the United States. *Fred N. Howser,* Attorney General of California, and *Everett W. Mattoon,* Assistant Attorney General, for defendant. *A. L. Weil* filed a brief, as *amicus curiae,* opposing the petition of the United States.

No. 437. WOODS, HOUSING EXPEDITER, *v.* HILLS. Order entered amending opinion. Rehearing denied.

Opinion reported as amended, *ante,* p. 210.

No. 555, Misc. BOYLES *v.* HUDSPETH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 561, Misc. SHOTKIN *v.* KAPLAN ET AL. Petition for appeal denied.

No. 562, Misc. KRUSE *v.* BLAISDELL, DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 571, Misc. IN RE GRONWALD ET AL. Motion for leave to file a petition for an original writ of habeas corpus and prohibition denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that the motion for leave to file should be granted and that the case should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Certiorari Granted. (*See also No. 775, supra.*)

No. 806. LAWSON, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, *v.* SUWANNEE FRUIT & STEAMSHIP CO. ET AL. C. C. A. 5th. Certiorari granted. *Solicitor General Perlman* for petitioner. *Harry T. Gray* and *Sam R. Marks* for respondents. Reported below: 166 F. 2d 13.

No. 811. UNITED STATES EX REL. PASELA *v.* FENNO, COMMANDING OFFICER. C. C. A. 2d. Certiorari granted. *Frank A. Francis* and *Benedict M. Holden, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney*

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General Quinn, Robert S. Erdahl and *Philip R. Monahan* for respondent. Reported below: 167 F. 2d 593.

No. 816. MARZANI *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari granted. *Osmond K. Fraenkel* and *Allan R. Rosenberg* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 133.

No. 567, Misc. TURNER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari granted. *Edwin P. Rome* and *Clinton Budd Palmer* for petitioner. Reported below: 358 Pa. 350, 58 A. 2d 61.

Certiorari Denied.

No. 584. UNITED STATES EX REL. ACKERMANN *v.* O'ROURKE, OFFICER IN CHARGE; and

No. 585. UNITED STATES EX REL. ACKERMANN *v.* O'ROURKE, OFFICER IN CHARGE. C. C. A. 5th. Certiorari denied. *George C. Dix* and *E. M. Grimes* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondent. Reported below: 164 F. 2d 95.

No. 796. MASON *v.* MERCED IRRIGATION DISTRICT. C. C. A. 9th. Certiorari denied. Reported below: 165 F. 2d 634.

No. 797. REYNOLDS METALS CO. *v.* SKINNER ET AL. C. C. A. 6th. Certiorari denied. *Walter L. Rice* for petitioner. *Leo T. Wolford* for respondents. Reported below: 166 F. 2d 66.

Nos. 802 and 803. DEBARDELEBEN COAL CORP. *v.* OTT, COMMISSIONER OF PUBLIC FINANCE. C. C. A. 5th. Cer-

tiorari denied. *Arthur A. Moreno* for petitioner. *Henry B. Curtis* for respondent. Reported below: 166 F. 2d 509.

Nos. 818 and 823. OTT, COMMISSIONER OF PUBLIC FINANCE, *v.* MISSISSIPPI VALLEY BARGE LINE CO.;

Nos. 819 and 825. MONTGOMERY, STATE TAX COLLECTOR, *v.* MISSISSIPPI VALLEY BARGE LINE CO.;

Nos. 820 and 822. OTT, COMMISSIONER OF PUBLIC FINANCE, *v.* AMERICAN BARGE LINE CO.;

Nos. 821 and 826. MONTGOMERY, STATE TAX COLLECTOR, *v.* AMERICAN BARGE LINE CO.; and

No. 824. OTT, COMMISSIONER OF PUBLIC FINANCE, *v.* UNION BARGE LINE CORP. C. C. A. 5th. Certiorari denied. *Henry B. Curtis* for petitioners. *Arthur A. Moreno* for respondents. Reported below: 166 F. 2d 509.

No. 805. GLASSEY *v.* HORRALL, CHIEF OF POLICE OF LOS ANGELES. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Ray L. Chesebro, Donald M. Redwine* and *John L. Bland* for respondent.

No. 829. SHAPIRO *v.* SHAPIRO ET AL. C. C. A. 2d. Certiorari denied. *Edward Norwalk* for petitioner. *Solicitor General Perlman* for the United States, and *James G. Mitchell* for Annette Shapiro, respondents. Reported below: 166 F. 2d 240.

No. 848. YOUNG *v.* UNITED STATES;

No. 849. DEER *v.* UNITED STATES; and

No. 850. POLK *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. *Austin M. Cowan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 163 F. 2d 187.

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No. 256. PETERS *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. *Norman L. Meyers* for petitioner. *Solicitor General Perlman,* Assistant Attorney General *Quinn, Philip Elman, Robert S Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 160 F. 2d 858, 161 F. 2d 940.

No. 812. McKEWEN *v.* McKEWEN ET AL. C. C. A. 5th. Certiorari denied. *Garner W. Green* and *P. Z. Jones* for petitioner. *Solicitor General Perlman* for the United States, and *S. M. Graham* for Marjorie L. McKewen, respondents. Reported below: 165 F. 2d 761.

No. 408, Misc. CARMELO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 444, Misc. HALEY *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. J. E. Taylor,* Attorney General of Missouri, and *Tyre W. Burton,* Assistant Attorney General, for respondent.

No. 466, Misc. RITCHIE (ARON) *v.* DRIER ET AL. United States Court of Appeals for the District of Columbia. Certiorari denied. *Robert C. Bell, Jr.* for petitioner. *Bernard J. Gallagher* and *M. Walton Hendry* for Drier; *Richard L. Merrick* for Aron; and *Soterios Nicholson* for Stern Brothers et al., respondents. Reported below: 83 U. S. App. D. C. —, 165 F. 2d 238.

No. 504, Misc. Moss *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Reported below: 167 F. 2d 683.

No. 511, Misc. SOLIS *v.* CLEMMER, DIRECTOR. United States Court of Appeals for the District of Columbia.

Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 155.

No. 556, Misc. JONES *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 557, Misc. VOLKMAN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 558, Misc. MURPHY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 559, Misc. SHOTKIN ET AL. *v.* THOMAS A. EDISON, INC. C. C. A. 10th. Certiorari denied. Reported below: 163 F. 2d 1020.

No. 560, Misc. WEHR *v.* RAGEN, WARDEN. Circuit Court of Bureau County, Illinois. Certiorari denied.

No. 563, Misc. DENNIS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 564, Misc. JOHNSON *v.* HIATT, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 167 F. 2d 738.

No. 565, Misc. HAYES *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 568, Misc. KILGALLEN *v.* NEW YORK. County Court of Queens County, New York. Certiorari denied.

No. 569, Misc. GRANT *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 570, Misc. BURNS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied. (*See also No. 437, supra.*)

No. 461. UNITED STATES *v.* COLUMBIA STEEL CO. ET AL., *ante*, p. 495. Rehearing denied.

No. 544. UNITED STATES *v.* NATIONAL CITY LINES, INC. ET AL., *ante*, p. 573. Rehearing denied.

No. 655. PHYLE *v.* DUFFY, WARDEN, *ante*, p. 431. Rehearing denied.

No. 697. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, *ante*, p. 827. Rehearing denied.

Nos. 716 and 717. HAZELTINE CORPORATION *v.* KIRKPATRICK, U. S. DISTRICT JUDGE, *ante*, p. 819. Rehearing denied.

No. 810. TINKOFF *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION ET AL., *ante*, p. 833. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 326, Misc. O'LOUGHLIN *v.* PARKER, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, 333 U. S. 868. Motion for leave to file a third petition for rehearing denied.

No. 500, Misc. COLE ET AL. *v.* NEW JERSEY, *ante*, p. 851. Rehearing denied.

No. 519, Misc. HARRIS *v.* CITY OF NEW YORK, *ante*, 836. Rehearing denied.

No. 528, Misc. IN RE PIERCE, *ante*, p. 831. Rehearing denied.

AMENDMENTS OF RULES.

ORDER.

IT IS ORDERED that paragraph 3 of Rule 38 of the Rules of this Court be amended to read as follows:

"3. Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof), and due proof of service shall be filed with the clerk. If the United States, or an officer or agency thereof, is respondent, the service of the petition, record, and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof), after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27. The brief must bear the name of a member of the bar of this court at the time of filing."

IT IS ORDERED that paragraph 2 of Rule 41 of the Rules of this Court be amended to read as follows:

"2. Within thirty days after the petition, brief, and record are served (unless enlarged by the court or a justice thereof) the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs, and record shall be distributed by the clerk to the court for its consideration. (See Rule 38, par. 4 (a).)"

MAY 17, 1948.

AMENDMENTS OF ADMIRALTY RULES.

ORDER.

IT IS ORDERED that rules 51, 52, 53, and 54 of the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction be, and they are hereby, amended to read as follows:

RULE 51. *Limitation of Liability—How Claimed.*—The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file

an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

UNITED STATES DISTRICT COURT

DISTRICT OF

NOTICE OF PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed.....)

Notice is given that ..... has filed a petition pursuant to Title 46, U. S. Code, §§ 183–189, claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the vessel ..... from ..... to ..... terminating on .....

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U. S. Court House at ..... and serve on or mail to the petitioner's proctors ..... at ..... a copy on or before ..... or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

. . . . . .

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.

RULE 52. *Filing and Proof of Claim in Limited Liability Proceedings.*—Claims shall be filed with the Clerk of the Court in writing under oath and a copy shall be served upon the proctor for the petitioner on or before the return day of the monition. Each claim shall specify the various allegations of fact upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. Within thirty days after the return day of the monition or within such time as the Court thereafter may allow, the petitioner shall mail to the proctor for each claimant (or if the claimant have no proctor to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his proctor or attorney (if he is known to have one), (c) the nature of his claim, i. e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage, or, in case of wreck, the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight; and if the court finds that the amount of the interim stipulation is either insufficient or excessive, the court shall make an order for the payment of the proper amount into court or, as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; but no objection to any claim need be filed by any party to the proceeding; and on the completion of said proofs, the commissioner shall make report, or the court its findings on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid or the proceeds of said vessel, or her wreckage, etc., and freight (after payment of costs and expenses) shall upon determination of liability be divided pro rata, subject to all provisions of law thereto appertaining, amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

RULE 53. *Rights of Owner to Contest Liability and of Claimants to Contest Exoneration from Liability or Limi-*

tation of Liability of Owner.—In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied.

RULE 54. *Courts Having Cognizance of Limited Liability Procedure.*—The said petition shall be filed and the said proceedings had in any District Court of the United States in which said vessel has been libeled to answer for any claim in respect to which the petitioner seeks to limit liability; or, if the said vessel has not been libeled, then in the District Court for any district in which the owner has been sued in respect to any such claim. When the said vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner, the said proceedings may be had in the District Court of the district in which the said vessel may be, but if said vessel is not within any district and no suit has been commenced in any district, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules.

JUNE 21, 1948.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1945, 1946, AND 1947

Terms	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
	1945	1946	1947	1945	1946	1947	1945	1946	1947	1945	1946	1947
Number of cases on dockets	12	12	12	1,317	1,512	879	131	154	579	1,460	1,678	1,470
Number disposed of during terms	0	0	0	1,161	1,366	772	131	154	567	1,292	1,520	1,339
Number remaining on dockets	12	12	12	156	146	107	0	0	12	168	158	131

	TERMS		
	1945	1946	1947
Distribution of cases disposed of during terms:			
Original cases	0	0	0
Appellate cases on merits	218	260	217
Petitions for certiorari	943	1,106	555
Miscellaneous docket applications	131	154	567

	TERMS		
	1945	1946	1947
Distribution of cases remaining on dockets:			
Original cases	12	12	12
Appellate cases on merits	102	95	61
Petitions for certiorari	54	51	46
Miscellaneous docket applications	0	0	12

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2. *Sherman Act—Monopoly and restraint of trade—Reasonableness of restraint—Steel industry.*—Acquisition by United States Steel Corporation of Consolidated Steel Corporation, largest West Coast fabricator, not violation of Act. United States v. Columbia Steel Co., 495.

3. *Sherman Act—Violation—Interstate commerce—Beet sugar industry.*—Right of action by growers against refiner who conspired with others and fixed prices of sugar beets; conspiracy as affecting interstate rather than purely local commerce. Mandeville Island Farms v. American Crystal Sugar Co., 219.

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1. *"Agreeable to the usages and principles of law."*—Judicial Code § 262. Price v. Johnston, 266.

2. *"At the expiration of the sentence now being served."*—Hunter v. Martin, 302.

3. *"Discharge."*—Selective Training & Service Act. Hilton v. Sullivan, 323.

4. *"Due effect."*—Veterans' Preference Act. Hilton v. Sullivan, 323.

5. *"Every State and Territory."*—As including District of Columbia. Hurd v. Hodge, 24.

6. *"Excessive profits."*—Renegotiation Act. Lichter v. United States, 742.

7. *"Final" judgment.*—Judicial Code § 237. Republic Natural Gas Co. v. Oklahoma, 62.

8. *"Necessary and proper."*—Const., Art. I, § 8. Lichter v. United States, 742.

9. *"Overtime premium."*—Fair Labor Standards Act. Bay Ridge Co. v. Aaron, 446.

10. *"Regular rate."*—Fair Labor Standards Act. Bay Ridge Co. v. Aaron, 446.

11. *"State."*—As including District of Columbia. Hurd v. Hodge, 24.

YOUTHS. See **Constitutional Law,** X, 7.

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